# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 196.

JOSEPH E. BINNS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

FILED JANUARY 31, 1903.

(18,791.)

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INDEX.


| | Original. | Print. |
|---|---|---|
| Proceedings in commissioner's court | 1 | 1 |
| Complaint | 1 | 1 |
| Warrant | 2 | 1 |
| Marshal's return | 2 | 2 |
| Notice of appeal | 4 | 2 |
| Docket entries | 5 | 3 |
| Commissioner's certificate | 7 | 5 |
| Undertaking on appeal | 8 | 5 |
| Minute entry as to agreement to submit on agreed facts | 10 | 7 |
| Minute entry as to submission, &c | 11 | 7 |
| Answer and plea | 12 | 7 |
| Minute entry of proceedings, &c | 14 | 8 |
| Opinion | 15 | 9 |
| Judgment | 18 | 10 |
| Minute entry of proceedings, &c | 20 | 12 |
| Petition for writ of error | 21 | 12 |
| Order allowing writ of error | 21 | 13 |
| Assignment of errors | 22 | 13 |
| Bond on writ of error | 24 | 14 |
| Minute entry of proceedings, &c | 26 | 15 |
| Writ of error (original) | 27 | 16 |
| Writ of error (copy) | 29 | 17 |
| Citation and service | 31 | 18 |
| Clerk's certificate | 33 | 18 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 20, 1903.

*Criminal Complaint.*

In the United States Commissioner's Court for the Precinct of Nome, Second Division, District of Alaska, at Nome.

UNITED STATES OF AMERICA, } ss:
*District of Alaska, Precinct of Nome,* }

THE UNITED STATES }
*vs.* } Complaint for the Violation of Section —.
JOSEPH R. BINNS. }

Joseph R. Binns is accused by W. N. Landers by this complaint of the crime of carrying on the business of a transfer company without a license committed as follows: The said Joseph R. Binns in the district of Alaska and within the jurisdiction of this court, did on the 4th day of December A. D. 1901, wrongfully and unlawfully prosecute and carry on the business of a transfer company without first applying for and obtaining a license so to do from the district court of the district of Alaska second division thereof contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

W. N. LANDERS.

Subscribed and sworn to before me this 4" day of Dec. A. D. 1901.

T. M. REED,
*U. S. Commissioner and ex-Officio Justice of the Peace.*

Endorsed: No. 68 In the United States commissioner's court precinct of Nome. The United States of America *vs.* Joseph R. Binns Complaint Filed this 4 day of Dec. 1901. T. M. Reed United States commissioner. R.

2 *Warrant.*

In the United States Commissioner's Court for the Precinct of Nome, Second Division, District of Alaska, at Nome.

UNITED STATES OF AMERICA, } ss:
*District of Alaska, Precinct of Nome,* }

In the name of the United States of America to the United States marshal or any of his deputies for the district of Alaska, Greeting:

Information upon oath having been this day laid before me that the crime of carrying on transfer business without having first procured a license therefor, has been committed, and accusing Joseph R. Binns thereof.

You are hereby commanded forthwith to arrest the above named Joseph R. Binns and bring him before me at the U. S. commissioner's court room, at Nome, Alaska, to answer said complaint and be further dealt with as the law directs.

Hereof fail not and make return of this warrant with your doings therein.

Given under my hand this 4th day of December A. D. 1901.

T. M. REED,
*U. S. Commissioner and ex-Officio Justice of the Peace.*

UNITED STATES OF AMERICA, }
*Second Division, District of Alaska,* } ss:

I hereby certify and return that I received the within warrant this 4th day of December 1901, and that thereafter on the 8th day of January 1902, I served the same on the within named defendant by taking under arrest the within named defendant at Nome
3 Alaska on the 8th day of January 1902.

FRANK H. RICHARDS,
*United States Marshal,*
By JOHN H. D. BOUSE, *Deputy.*

*Fees.*

| | |
|---|---|
| Services | $4 |
| Mileage | |
| Attendance | |
| Total | $4 |

Endorsed: No. 68 In the United States commissioner's court precinct of Nome. The United States of America *vs.* Joseph Binns. Warrant. Filed this 13 day of Jan. 1902. T. M. Reed com'r. R.

4 In the United States Commissioner's Court for the Precinct of Nome, Second Division of the District of Alaska.

Before Hon. T. M. Reed, Commissioner.

UNITED STATES, Plaintiff, }
*vs.* } Notice.
JOSEPH BINNS, Defendant. }

To J. L. McGinn, assistant United States district attorney for the second division of the district of Alaska:

You will take notice that the defendant in the above entitled action hereby appeals from that certain judgment rendered in the above entitled court against the defendant, adjudging the defendant guilty of carrying on the business of a transfer company without

having procured a license, and adjudging that defendant pay a fine of ten dollars and costs taxed at ten dollars and 90/100. and be imprisoned in the district jail until such fine and costs are paid, not exceeding ten days, entered on the 17th day of January, A. D. 1902, to the district court for the second division of the district of Alaska.

ALBERT FINK,
JAMES BELL,
*Attorneys for Defendant.*

Service of a true copy of the within notice is hereby accepted this 1st day of Feb. 1902.

W. N. LANDERS,
*Attorney for Plaintiff.*

Endorsed: No. 68. United States com'n'r's court district of Alaska Nome precinct United States plaintiff *vs.* Joseph Binns defendant. Notice of appeal (Orig.) Filed Feb. 12–1902, T. M. Reed, com'r. R. clerk. Albert Fink and James Bell attorneys for def't.

5 Docket of United States Commissioner, District of Alaska, 2nd Division, Nome Precinct.

UNITED STATES
*vs.*
JOSEPH BINNS.

Complaint made by W. N. Landers. Offence charged: Engaging in transfer business without a license. Offence committed at Nome on the 4th day of Dec., 1901. Place of arrest, Nome. Fine, $10.00 & costs.

1901.

Dec. 4.—Complaint filed
" " Warrant issued
Jan. 13.— " returned with defendant.
Def't pleads not guilty and with the consent of dist. attorney is released on his own recognizance and cause set for trial Jan. 14th at 10 a. m.
Jan. 14, 10 a. m.—Parties appear and announce themselves ready for trial and thereupon dist. attorney makes statement of the facts he expects to prove in said cause, and def't's attorney Albert Fink, consenting that such statement comprises all the facts in said cause, it is stipulated that said cause shall be tried upon such statement, and that the same shall constitute an agreed statement of facts, and thereupon the court takes the matter under advisement until Friday, Jan. 17—at 10 a. m.

1902.

Jan. 17, 10 a. m.—The above named Joseph Binns having been brought before me, T. M. Reed, a commissioner and *ex-officio* justice of the peace, in a criminal action for the crime of carrying on the business of a transfer company without having procured a license therefor and the said Joseph Binns having thereupon pleaded not guilty, and been duly tried by me, and upon such trial duly convicted, I have adjudged that he pay a fine of ten dollars and the costs of this action, taxed
6 at 10 90/100 dollars, and be imprisoned in the district jail, until such fine and costs be paid, not exceeding 10 days.

T. M. REED,
*Commissioner and ex-Officio Justice of the Peace.*

Feb. 12.—Notice of appeal filed.
" " Bond on " " and approved and appeal allowed, and proceedings stayed.
Names of sureties, C. L. Morris, Nome,
L. C. Read, "
" " Transcript issued.
U. S. dist. att'y, attorney for plaintiff
Albert Fink, attorney for defendant.

*Commissioner's Fees.*

1901.

| | | | |
|---|---|---|---|
| Dec. | 4. | —Drawing complaint, oath & jurat | $1.00 |
| " | " | Filing | .15 |
| " | " | Issuing warrant of arrest | 1.50 |
| " | " | Return & filing | .50 |
| " | 13. | —Continuance to Jan. 17–1902 | .75 |
| " | 17. | —Entering judgment | 1.50 |
| " | " | Taxing costs | 1.50 |
| | | | 6.80 |
| " | " | Marshal's fees | $4.00 |

*Accrued Costs.*

1902.

| | | | |
|---|---|---|---|
| Feb. | 12. | —Filing notice of appeal | .15 |
| " | " | " bond on " | .15 |
| " | " | Taking " " " | 1.50 |
| " | " | Issuing transcript | 1.50 |
| " | " | 4½ folios | 1.80 |
| | | | 5.10 |

7 UNITED STATES, } ss:
*District of Alaska, Nome Precinct,* }

I hereby certify that the foregoing pages numbered one to three inclusive, contain a copy of all the entries in my docket relating to the above entitled cause on the appeal thereof, and the annexed hereto are all the original papers relating to said cause on the appeal thereof and filed with me, and comprising pages one to seven.

Dated Feb. 12, 1902.

T. M. REED,
*Commissioner and ex-Officio Justice of the Peace.*

Endorsed: 154 C. U. S. *vs.* Joseph Binns. Transcript on appeal. Filed in the office of the clerk of the U. S. dist. court, Alaska, second division, at Nome, Alaska, Feb. 15 1902 H. G. Steel, clerk. By H. C. Gordon deputy clerk. Reber.

8 In the United States Commissioner's Court for the Precinct of Nome, Second Division of the District of Alaska.

Before Hon. T. M. Reed, Commissioner.

UNITED STATES, Plaintiff, }
*vs.* } Undertaking.
JOSEPH BINNS, Defendant. }

A judgment having been given in the above entitled court on the 17th day of January, A. D., 1902, whereby Joseph Binns was adjudged guilty of carrying on the business of a transfer company without having procured a license, and condemned to pay a fine of ten dollars and costs of suit taxed at ten and 90/100 dollars, and be imprisoned in the district jail until such fine and costs be paid, and he having appealed from said judgment and been duly admitted to bail in the sum of two hundred and fifty dollars,

We, C. L. Morris, a resident of Nome, district of Alaska, and by occupation a freighter, and L. C. Read, a resident of Nome, district of Alaska, and by occupation a freighter, hereby undertake that the above named Joseph Binns shall in all respects abode and perform the orders and judgments of the appellate court upon the appeal, or if he fail to do so in any particular, that we will pay to the United States the sum of two hundred and fifty dollars, and do further undertake and promise, on the part of the appellant, that the said appellant will pay all costs and disbursements that may be awarded against him on said appeal.

Witness our hands and seals this 1st day of February, A. D., 1902.

JOSEPH R. BINNS (*Principal*).
C. L. MORRIS.
L. C. READ.

Taken and acknowledged before me this 17th day of Feb'y 1902.

T. M. REED,
*U. S. Com'r.*

9 UNITED STATES OF AMERICA, *District of Alaska,* } ss:

C. L. Morris, being first duly sworn, deposes and says:—That I am a resident of the second division of the district of Alaska, that I am not a counsellor or attorney, marshal, clerk of any court, or other officer of any court; that I am worth the sum specified in the foregoing undertaking, exclusive of property exempt from execution, and over and above all just debts and liabilities.

C. L. MORRIS.

Subscribed and sworn to before me this 1st day of February, A. D. 1902.

T. M. REED,
*U. S. Commissioner and ex-Officio Justice of the Peace.*

UNITED STATES OF AMERICA, *District of Alaska,* } ss:

L. G. Read, being first duly sworn, deposes and says:—That I am a resident of the second division of the district of Alaska; that I am not a counsellor or attorney, marshal, clerk of any court, or other officer of any court; that I am worth the sum specified in the foregoing undertaking, exclusive of property exempt from execution, and over and above all just debts and liabilities.

L. C. READ.

Subscribed and sworn to before me this 12th day of February, A. D. 1902.

T. M. REED,
*U. S. Commissioner and ex-Officio Justice of the Peace.*

Feb. 12, 1902.—The foregoing bond approved and appeal allowed.

T. M. REED, *Com'n'r.*

Endorsed: 154 C United States com'n'r's court district of Alaska Nome precinct. United States plaintiff *vs.* Joseph Binns defendant Undertaking on appeal. (Orig.) Filed Feb. 12 1902. T. M. Reed, com'n'r. R. Filed in the office of the clerk of the U. S. dist. court, Alaska, second division, at Nome, Alaska, Feb. 15 1902 H. G. Steel, clerk. By H. C. Gordon deputy clerk. Albert Fink and James Bell attorneys for def't. Volume 1 page 126 Reber.

10 In the United States District Court for the District of Alaska, Second Division.

Term minutes, special February, 1902, term, begun and held at the town of Nome, in said district and division.

SATURDAY, *March* 15, 1902.

U. S. vs. BINNS. } # 154 C.

Mr. Fink stated that he was ready in this case and that the district attorney and he would agree upon a statement of facts and submit the same to the court.

11 In the United States District Court for the District of Alaska, Second Division.

Term minutes, special February, 1902, term, begun and held at the town of Nome, in said district and division.

SATURDAY, *March* 22, 1902.

U. S. vs. BINNS. } # 154 C.

Mr. Orton stated that the defendant was willing to admit in open court that the facts stated in the complaint are true and asked that the case be heard at once.

The court directed that authorities be submitted within a few days by Mr. Orton to Mr. McGinn, and that he reply thereto as soon as possible, when the matter will be taken under consideration by the court.

12 In the United States District Court for the District of Alaska, Second Division, on Appeal from the United States Commissioner's or Justice's Court for the Precinct of Nome, Second Division, District of Alaska.

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH R. BINNS, Defendant. }

Comes now the defendant in the above entitled action and answering and pleading to the complaint herein admits that on the 4th day of December, 1901, in the district of Alaska, second division thereof, he did prosecute and carry on the business of a transfer

company without first paying for and obtaining a license so to do from the district court of the district of Alaska, second division thereof, but the said defendant further shows to the court and alleges that section 460 of the act entitled, "An act to define and punish crimes in the district of Alaska and to provide a code of criminal procedure for said district," approved March 3rd, 1899, as amended by section 29 of the act entitled, "An act making further provisions for a civil government for Alaska and for other purposes," approved June 6th, 1900, under which said section the defendant is proceeded against herein is unconstitutional and void by reason of the provisions of paragraph one of section eight of article one of the Constitution of the United States, which reads as follows:

"The Congress shall have power to lay and collect taxes, duties, "imposts and excises to pay the debts and provide for the common "defense and general welfare of the United States; but all duties, "imposts and excises shall be uniform throughout the United States."

Wherefore, the defendant prays to go hence dismissed without day.

13

ALBERT FINK,
IRA D. ORTON,
JAS. W. BELL,
*Attorneys for Defendant Binns.*

Endorsed: 154 crim. District court: district of Alaska: second division: On appeal from the U. S. commissioner's or justice's court for the Nome precinct, second division of the dist. of Alaska. United States of America pl'ff *vs.* Joseph R. Binns, defd. Answer and plea of the defendant. Filed in the office of the clerk of the U. S. dist. court, Alaska, second division, at Nome, Alaska, Apr. 5 1902. H. G. Steel, clerk, by H. C. Gordon deputy clerk. Ira D. Orton and Albert Fink, att'ys for defd. Reber.

14 In the United States District Court for the District of Alaska, Second Division.

Term minutes, special February, 1902, term, begun and held at the town of Nome, in said district and division.

SATURDAY, *April* 5, 1902—9 a. m.

UNITED STATES
*vs.*
BINNS. } # 154 C.

Opinion filed overruling objections to defendant's — and rendering judgment accordingly.

Mr. Orton asks leave to serve a written plea in the place of oral plea in order to make a record.

Mr. Orton of counsel for defendant and Mr. Fink ask for a stay of execution, both of which motions were granted.

15 In the United States District Court for the District of Alaska, Second Division.

UNITED STATES, Plaintiff,
*vs.*
JOSEPH R. BINNS, Defendant. } Opinion.

John L. McGinn, dept. dist. att'y for plaintiff,
Ira D. Orton and Albert Fink for defendant.

The defendant was found guilty and condemned to pay a fine and costs in the justice's court for violating section 29 of the act of Congress entieled "An act making further provisions for a civil government for Alaska, and for other purposes," approved June 6, 1900 (31 Stat. L. 321). The section mentioned provides that all persons or corporations prosecuting the lines of business therein mentioned shall apply to and obtain from this court a license so to do and pay the license fee fixed therein. Defendant was arrested and fined for carrying on the business of a transfer company without applying for and obtaining the necessary license; section 29 in specifying the classes of person- who shall pay license and the amount contains this clause "Transfer companies, fifty dollars per annum." It is admitted by counsel for defendant that he was operating as such transfer company and had not paid the license; the matter comes before the court upon an objection in the nature of a demurrer to the complaint, as well as to the evidence.

Counsel for defendant urge that section 29 of the act of Congress of June 6, 1900 (*supra*) is unconstitutional and void for the following reasons, viz: (1) That Alaska is an organized Territory; (2) that the Constitution and laws of the United States which are not locally inapplicable are extended to Alaska by section 1891, R. S. 1878; (3) that having thus formally extended the Constitution to Alaska, Congress could not thereafter pass a law for Alaska in conflict with
16 its provisions; (4) that the section in question is an excise law, and (5) therefore it is necessarily unconstitutional and void as in conflict with the provisions of section 8 of article one of the Constitution which requires all excise duties to be uniform throughout the United States.

This court will not undertake to answer in detail the many interesting and important questions propounded by counsel for the defendant. The case involves little more than an abstract question of law, for the fine imposed is only nominal and the evident purpose of the cause is to secure a final construction of the law by the courts of the highest resort. It is only fair, however, to say that I disagree with the conclusions of counsel for defendant upon the main question involved. The Supreme Court of the United States has not passed upon the points raised in this case in relation to the Territory of Alaska. I cannot find authority even in Downs *v.* Bidwell to support the argument of counsel for defendant,—but the opposite.

The circuit court of appeals for the 9th circuit, however, to which appeals lie directly from this court, has practically decided every point in controversy in this case in its relation to Alaska, and that decision will be followed by this court until modified or overruled. In the case of Endleman *v.* United States, 86 Fed. 456, the unconstitutionality of the act of Congress forbidding the sale of liquor in Alaska was urged upon practically the same grounds urged against the act in question. In answer to these objections that court said:

"The answer to these and other like objections urged in the brief of counsel for defendant is found in the now well established doctrine that the Territories of the United States are entirely subject to the legislative authority of Congress. They are not organized under the Constitution nor subject to its complex distribution of the powers of government as the organic law, but are the creation, exclusively, of the legislative department, and subject to its supervision and control."

It follows, of course, that if the Territory of Alaska is "not organized under the Constitution, nor subject to its complex distribution of powers of government as the organic law," that the provisions of section 8 of article one of that Constitution can have no such application to it as to render void the law in controversy. Cer-
17 tainly this court will not declare such a result without more support from the courts of higher authority in direct relation to the territory of Alaska. The objections of defendant are overruled and judgment rendered accordingly.

Dated this 5th day of April, 1902.

JAMES WICKERSHAM,
*District Judge.*

Endorsed: No. 154 crim. In the United States district court for the district of Alaska, second division. United States, plaintiff, *vs.* Joseph R. Binns, defendant. Opinion. Filed in the office of the clerk of the U. S. dist. court, Alaska, second division, at Nome, Alaska, Apr. 5, 1902., H. G. Steel, clerk.

18 At a special term of the United States district court for the district of Alaska, second division, begun and holden in the town of Nome, commencing on the 17th day of February, 1902.

THE UNITED STATES, Plaintiff,
*vs.*
JOSEPH R. BINNS, Defendant. } Judgment.

The above entitled action came on regularly for trial at a special term of the above entitled court begun and holden in the town of Nome, district of Alaska, commencing on the 17th day of February, 1902, and a jury trial having been expressly waived by the defendant the court proceeded to try and determine the case without a jury. And said defendant Joseph R. Binns in person and by his attorneys having filed herein an answer in words and figures as follows:

"In the United States District Court for the District of Alaska, Second Division.

On appeal from the United States commissioner's or justice's court for the precinct of Nome, second division, district of Alaska.

UNITED STATES OF AMERICA, Plaintiff,
*vs.*
JOSEPH R. BINNS, Defendant.

Comes now the defendant in the above entitled action and answering and pleading to the complaint herein admits that on the 4th day of December, 1901, in the district of Alaska, second division thereof, he did prosecute and carry on the business of a transfer company without first paying for and obtaining a license so to do from the district court of the district of Alaska, second division thereof, but the said defendant further shows to the court and alleges that section 460 of the act entitled "An act to define and punish crimes in the district of Alaska and to provide a code of criminal procedure for said district," approved March 3rd, 1899, as amended by section 29 of the act entitled, "An act making further pro-
19 visions for a civil government for Alaska and for other purposes," approved June 6, 1900, under which said section the defendant is proceeded against herein is unconstitutional and void by reason of the provisions of paragraph one of section eight of article one of the Constitution of the United States, which reads as follows:

"The Congress shall have power to lay and collect taxes, duties, "imposts and excises to pay the debts and provide for the common "defense and general welfare of the United States; but all duties, "imposts and excises shall be uniform throughout the United "States."

Wherefore the defendant prays to go hence dismissed without day.

ALBERT FINK,
IRA D. ORTON,
JAS. W. BELL,
*Attorneys for Defendant.*

And the district attorney of the United States for the district of Alaska, second division, and said defendant having submitted the cause upon the complaint herein and said answer and plea aforesaid, by reason of the law and the premises it is by the court ordered that the defendant be, and he is hereby, found guilty, as charged in the complaint, of the offense of carrying on the business of a transfer company in the district of Alaska without having paid the license therefor, and it is further ordered and adjudged that said

Joseph R. Binns be, and he is hereby, fined therefor the sum of fifty ($50.00) dollars and costs.

Done in open court at Nome, Alaska, this 20th day of May, 1902.

JAMES WICKERSHAM,
*Judge of the District Court, District of Alaska, Second Division.*

O. K.
J. L. McGINN.

Endorsed: 154 C. At a special term of the U. S. district court for the dist. of Alaska, 2nd div., begun and holden in the town of Nome, commencing on 17th Feb., 1902. The United States, plaintiff, *vs.* Joseph R. Binns, def't. Judgment. Filed in the office of the clerk of the U. S. dist. court, Alaska, 2nd division, at Nome, Alaska, May 20, 1902, H. G. Steel, clerk, by H. C. Gordon, deputy clerk. Journal 2, page 192. Ent. J. D. page 114.

20 In the United States District Court for the District of Alaska, Second Division.

Term minutes, special February, 1902, term, begun and held at the town of Nome, in said district and division.

TUESDAY, *May* 20, 1902—10 a. m.

UNITED STATES
*vs.*
BINNS. } # 154 C.

Judgment signed and filed finding defendant guilty of carrying on business of a transfer company without license and fining him fifty dollars and costs.

21 In the United States District Court for the District of Alaska, Second Division.

THE UNITED STATES OF AMERICA
*vs.*
JOSEPH R. BINNS, Defendant. } Petition for Writ of Error.

The defendant in the above entitled action, feeling himself aggrieved by the judgment and sentence therein, hereby prays the court to allow him a writ of error therefrom to the Supreme Court of the United States, and shows to the court that this case and the determination of said writ of error involves the construction and application of the Constitution of the United States, and also that in this case the constitutionality of a law of the United States is drawn

in question, all of which fully appears by the plea of the defendant and assignment of errors filed herein.

And your petitioner will ever pray.

ALBERT FINK,
J. W. BELL, &
IRA D. ORTON,
*Attorneys for said Defendant.*

It is ordered that the foregoing petition for a writ of error be and the same is hereby granted, and the cost bond to be given by defendant on said writ of error is hereby fixed at two hundred and fifty dollars.

Done in open court at Nome, Alaska, this 7th day of November, 1902.

ALFRED S. MOORE,
*Judge United States District Court,*
*District of Alaska, Second Division.*

Endorsed: 154 crim. U. S. district court, district of Alaska, second division. United States of America *vs.* Joseph R. Binns, defendant. Petition for writ of error and order allowing same. Filed in the office of the clerk of the U. S. dist. court, Alaska, second division, at Nome, Alaska, Nov. 6, 1902, Geo. V. Borchsenius, clerk. By H. A. Haagensen, deputy clerk.

22 In the United States District Court for the District of Alaska, Second Division.

THE UNITED STATES OF AMERICA *vs.* JOSEPH R. BINNS, Defendant. } Assignment of Errors.

Comes now the defendant in the above entitled action and assigns the following errors as having been committed by the said district court in the above entitled action, upon which the said defendant does and will rely upon his writ of error to the Supreme Court of the United States, viz:

First. The said district court had no jurisdiction of said action or of the person of the defendant.

Second. That said court erred in finding the defendant guilty and in pronouncing judgment upon the defendant, for that section 460 of the act, entitled "An act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for said district," approved March 3rd, 1899, as amended by sec. 29, title I of the act entitled, "An act making further provision for a civil government for Alaska and for other purposes," approved June 6th, 1900, under which said section the defendant is proceeded against herein is unconstitutional and void by reason of being in conflict with and repugnant to the provisions of paragraph

one of section eight of article one of the Constitution of the United States which reads as follows:

"The Congress shall have power to lay and collect taxes, duties, "imposts and excises, to pay the debts and provide for the common "defense and general welfare of the United States, but all duties, "imposts and excises shall be uniform throughout the United "States."

23 Third. The complaint filed herein does not state facts sufficient to constitute a crime or public offense.

Fourth. The court erred in overruling the plea of defendant.

Wherefore defendant prays that the judgment be reversed and that this cause be remanded to the said district court, with directions to dismiss the same.

ALBERT FINK,
J. W. BELL,
IRA D. ORTON,
*Attorneys for Defendant.*

Endorsed: 154 crim. U. S. district court, district of Alaska, 2nd division. United States of America, *vs.* Joseph R. Binns, def't Assignment of errors. Filed in the office of the clerk of the U. S. dist. court, Alaska, second division, at Nome, Alaska, Nov. 6, 1902, Geo. V. Borchsenius, clerk, by H. A. Haagensen, deputy clerk.

24 In the United States District Court for the District of Alaska, Second Division.

THE UNITED STATES OF AMERICA
*vs.*
JOSEPH R. BINNS, Defendant.

Know all men by these presents: that we, Joseph R. Binns, as principal, and J. E. Crane and H. G. Martens, as sureties, are held and firmly bound unto the United States of America in the sum of two hundred and fifty dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our representatives and assigns, firmly by these presents.

Whereas, the above named defendant has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled cause entered by the United States district court for the district of Alaska, second division,

Now, therefore the condition of this obligation is such that if the above named Joseph R. Binns shall prosecute said writ to effect and answer all costs, if he shall fail to make his plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

JOSEPH R. BINNS,
By JAS. W. BELL, *His Att'y.* [SEAL.]
J. E. CRANE. [SEAL.]
H. G. MARTENS. [SEAL.]

25 UNITED STATES OF AMERICA, } ss:
*District of Alaska,* }

H. G. Martens and J. E. Crane, the sureties to the foregoing bond being each duly sworn, each for himself, says, that he is worth the sum of five hundred dollars, over and above all debts and liabilities and exclusive of property exempt from execution.

H. G. MARTENS.
J. E. CRANE.

Subscribed and sworn to before me this 7th day of November, 1902.

W. VON DER LEITH,
*Notary Public in and for the District of Alaska, Second Division.*
[SEAL.]

The foregoing bond is hereby approved.
Dated Nov. 7th, 1902.

ALFRED S. MOORE, *Judge.*

O. K.
J. L. McGINN.

Endorsed: 154 crim. United States district court, district of Alaska, second division. United States of America *vs.* Joseph R. Binns, defendant. Bond on writ of error. Filed in the office of the clerk of the U. S. dist. court, Alaska, second division, at Nome, Alaska, Nov. 7, 1902, Geo. V. Borchsenius, clerk, by H. A. Haagensen, deputy clerk.

26 In the United States District Court, District of Alaska, Second Division.

Term minutes, special September, 1902, term, begun and held at the town of Nome, in said district and division, Sept. 15th, A. D. 1902.

FRIDAY, *November 7th,* 1902—10 a. m.

UNITED STATES
*vs.* } #154 C.
JOSEPH R. BINNS.

Petition of the defendant Joseph R. Binns for writ of error to the *the* Supreme Court of the United States.

Bond to cover costs filed in the sum of $250.00. Writ allowed by the court.

Permission of the court was asked and granted to have the date of the verification of the bond changed by the notary from Nov. 6th to Nov. 7th.

27 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judge of the United States district court for the district of Alaska, second division, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said district court, before you, between the United States of America, plaintiff and Joseph R. Binns, defendant, a manifest error hath happened to the great damage of said Joseph R. Binns, as is said and by complaint appears; we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 29th day of December, 1902, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of November in the year of our Lord one thousand nine hundred and two.

[Seal United States District Court, District of Alaska, Second Division.]

GEO. V. BORCHSENIUS,
*Clerk of the United States District Court,*
*District of Alaska, Second Division.*

Allowed by

ALFRED S. MOORE,
*Judge of the United States District Court,*
*District of Alaska, Second Division.*

28 [Endorsed:] 154 crim. (Original) U. S. district court, district of Alaska, second division. United States of America, *vs.* Joseph R. Binns, defendant. Writ of error. Filed in the office of the clerk of the U. S. dist. court, Alaska, second division, at Nome, Alaska. Nov. 7–1902 Geo. V. Borchsenius, clerk. By H. A. Haagensen, deputy clerk. Filed Nov. 7, 1902. Reber.

29 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judge of the United States district court for the district of Alaska, second division, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States of America, plaintiff and Joseph R. Binns, defendant, a manifest error hath happened to the great damage of said Joseph R. Binns, as is said and by complaint appears; we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 29th day of December, 1902, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of November in the year of our Lord one thousand nine hundred and two.

GEO. V. BORCHSENIUS,
[SEAL.] *Clerk of the United States District Court,*
*District of Alaska, Second Division.*

Allowed by:
ALFRED S. MOORE,
*Judge of the United States District Court,*
*District of Alaska, Second Division.*

30 Endorsed: 154 crim. U. S. district court, district of Alaska, second division. United States of America, *vs.* Joseph R. Binns, defendant. Writ of error. Lodged copy. The within copy of writ of error lodged in the clerk's office of the district court of the district of Alaska second division for the def't in error this 7th day of Nov. 1902. Geo. V. Borchsenius, clerk dist. ct. dist. Alaska 2nd div., by John H. Dunn, deputy clerk. Reber. Filed in the office of the clerk of the U. S. dist. court, Alaska, second division, at Nome, Alaska Nov. 7, 1902 Geo. V. Borchsenius, clerk, By H. A. Haagensen deputy clerk.

31 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

To Melvin Grigsby, United States district attorney for the district of Alaska, second division:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the 29th day of December, 1902, pursuant to a writ of error filed in the clerk's office of the United States district court of the district of Alaska, second division, wherein Joseph R. Binns is plaintiff in error and The United States of America is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Dated at Nome, Alaska, this 7th day of November, 1902.

ALFRED S. MOORE,
*Judge of the United States District Court,*
*District of Alaska, Second Division.*

Personal service of the foregoing citation made on me at Nome, Alaska, this — day of November 1903 is hereby admitted.

MELVIN GRIGSBY,
*United States District Attorney, District of Alaska, Second Division,*
By W. N. LANDERS, *Deputy.*

32 [Endorsed:] U. S. district court, district of Alaska, second division. United States of America, pl't'f, *vs.* Joseph R. Binns, def't. Citation. Filed in the office of the clerk of the U. S. dist. court, Alaska, second division, at Nome, Alaska, Nov. 7–1902 Geo. V. Borchsenius, clerk. By H. A. Haagensen, deputy clerk. Reber.

33 In the United States District Court for the District of Alaska, Second Division.

UNITED STATES *vs.* JOSEPH R. BINNS. } Clerk's Certificate.

I, Geo. V. Borchsenius, clerk of the United States district court, Alaska, second division, do hereby certify that the foregoing is a true, full and complete transcript in the above entitled cause as appears from the records and files of this office.

I further certify that the cost of record on appeal, amounting to seven and 50/100 dollars, has been paid by Ira D. Orton, one of the attorneys for the defendant in the above entitled cause.

Witness my hand and the seal of said court this 8th day of November, A. D., 1902.

{Seal United States District Court, District of Alaska, Second Division.}

GEO. V. BORCHSENIUS,
*Clerk United States District Court, Alaska, Second Division.*

34 [Endorsed:] No. — In the United States district court for the district of Alaska, second division United States of America *vs.* Joseph R. Binns defendant Transcript on appeal to ninth circuit U. S. circuit court of appeals

Endorsed on cover: File No. 18,791. Alaska D. C. U. S. Term No. 196. Joseph R. Binns, plaintiff in error, *vs.* The United States. Filed January 21, 1903.

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Office Supreme Court
FILED
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JAMES H. McKENNEY,
Clerk

No. 196

*IN THE*

# Supreme Court of the United States

**OCTOBER TERM, 1903**

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**JOSEPH R. BINNS**

Plaintiff in Error

vs.

**THE UNITED STATES**

In Error to the District Court of the United States
for the District of Alaska

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# Brief for Plaintiff in Error.

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J. C. CAMPBELL,
W. H. METSON
Attorneys for Plaintiff in Error

THE STAR PRESS—JAMES H. BARRY

*IN THE*

# Supreme Court of the United States

**OCTOBER TERM, 1903.**

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JOSEPH R. BINNS,
*Plaintiff in Error,*

vs.

THE UNITED STATES.

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## BRIEF FOR PLAINTIFF IN ERROR.

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### STATEMENT OF THE CASE.

This writ of error has been granted to review a judgment made, given and entered in and by the United States District Court for the District of Alaska, Second Division, on appeal from the United States Commissioner's Court for the precinct of Nome.

The plaintiff in error (defendant below), by a complaint filed in the Commissioner's Court, was accused of the crime of carrying on the business of a transfer company without a license. It is alleged in the complaint, "That said Joseph R. Binns * * * did

"* * * wrongfully and unlawfully prosecute and "carry on the business of a transfer company without "first applying for and obtaining a license so to do "from the District Court of the District of Alaska, "Second Division thereof" (Trans., p. 1). The defendant pleaded not guilty, was tried, convicted and adjudged to pay a fine (Trans., p. 4). An appeal was duly taken to the District Court (Trans., p. 2). The defendant therein answered to the complaint admitting that he did carry on such business without a license, but alleging that the statute under and by virtue of which the prosecution was maintained, is unconstitutional and void (Trans., p. 8). The defendant submitted the cause upon the complaint and answer, and was by the Court found guilty as charged, and the judgment now before this Court for review was made and entered that defendant be fined the sum of fifty dollars and costs (Trans., p. 10).

## ASSIGNMENT OF ERRORS.

*First.* The said District Court had no jurisdiction of said action or of the person of the defendant.

*Second.* The said Court erred in finding the defendant guilty and in pronouncing judgment upon the defendant, for that Section 460 of the Act entitled "An "Act to define and punish crimes in the District of "Alaska, and to provide a code of criminal procedure "for said District," approved March 3, 1899, as

amended by Section 29, Title I of the Act entitled "An Act making further provision for a civil government for Alaska and for other purposes," approved June 6, 1900, under which said section the defendant is proceeded against herein, is unconstitutional and void, by reason of being in conflict with and repugnant to the provisions of paragraph One of Section Eight of Article One of the Constitution of the United States.

*Third.* The complaint filed herein does not state facts sufficient to constitute a crime or public offense.

*Fourth.* The Court erred in overruling the plea of defendant.

## BRIEF OF ARGUMENT.

### I.

*This Court has jurisdiction to review the judgment of the District Court of Alaska, upon writ of error.*

### II.

*The statute under and by virtue of which this plaintiff in error was proceeded against is unconstitutional.*

## I.

THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE DISTRICT COURT OF ALASKA UPON WRIT OF ERROR.

The Act of March 3, 1899, entitled "An Act to de-
" fine and punish crimes in the District of Alaska and
" to provide a code of criminal procedure for said
" district," provides (Part II, Chap. 21, Sec. 202):
" That appeals and writs of error in criminal actions
" may be taken and prosecuted from the decisions and
" judgments of the District Court of the District of
" Alaska to the Supreme Court of the United States,
" or to the Circuit Court of Appeals for the Ninth
" Circuit, in the same manner and under the same
" regulations as from the Circuit and District Courts
" of the United States, under the Acts of Congress
" now in force or that may be hereafter enacted."

The Act of March 3, 1891, entitled "An Act to estab-
" lish Circuit Courts of Appeals and to define and
" regulate in certain cases the jurisdiction of the
" Courts of the United States, and for other pur-
" poses," provides (Sec. 5): "That appeals or writs
" of error may be taken from the District Courts and
" the existing Circuit Courts direct to the Supreme
" Court in the following cases: * * * In a case
" that involves the construction or application of the
" Constitution of the United States. In any case in
" which the constitutionality of any law of the United

" States, or the validity or construction of any treaty " made under its authority, is drawn in question."

In *Motes* vs. *United States* (178 U. S., 459, 466) this Court has said: "The Assistant Attorney-General sug- " gests as worthy of consideration whether, under this " interpretation of the statutes, the present case can " be brought directly from the Circuit Court. This " suggestion is based upon the provision in the Act " of January 20, 1897, C. 68, which withdraws from " the consideration of this Court, upon appeal or writ " of error direct from the Circuit Court, cases of con- " viction of infamous crimes not capital, and gives " jurisdiction in such cases, upon appeal or writ of " error, only to the proper Circuit Court of Appeals; " and it is assumed that no criminal case can, upon " any ground, be brought here directly from a Circuit " Court of the United States, unless it be a case of con- " viction of a capital crime. 29 Stat., 492. But such " is not the law. Among other cases, this Court, under " the Act of March 3, 1891, 26 Stat., 826, C. 517, estab- " lishing Circuit Courts of Appeals, can take cogni- " zance of a criminal case, upon writ of error to re- " view the judgment of a Circuit Court, when the case " really 'involves the construction or application of " the Constitution of the United States.' That Act " does not make a distinction between civil and crim- " inal causes such as is implied by the above sugges- " tion of the Government."

## II.

### The Statute Under and by Virtue of Which This Plaintiff in Error Was Proceeded Against Is Unconstitutional.

Section 460 of Part II of the Alaska Penal Code (Act of March 3, 1899, Title II), as amended by the Act of June 6, 1900, entitled "An Act making further "provision for a civil government for Alaska, and for "other purposes," provides "That any person or per- "sons, corporation, or company prosecuting or at- "tempting to prosecute any of the following lines of "business within the District of Alaska, shall first "apply for and obtain license so to do from a District "Court or a subdivision thereof in said district, and "pay for said license for the respective lines of busi- "ness and trade as follows, to-wit: * * * Trans- "fer companies, fifty dollars per annum."

Section 461 provides: "That any person, corpora- "tion, or company doing or attempting to do busi- "ness in violation of the provisions of the fore- "going section, or without having first paid the "license therein required, shall be deemed guilty "of a misdemeanor," etc.

Section 463 provides: "That the licenses provided "for in this Act shall be issued by the clerk of the "District Court or any subdivision thereof, duly made "and entered; * * * provided, that * * * "all moneys received for licenses by him * * *

"under this Act shall, except as otherwise provided by "law, be covered into the treasury of the United States, "under such rules and regulations as the Secretary "of the Treasury may prescribe."

Section 8 of Article I of the Constitution of the United States provides: "The Congress shall have "power to lay and collect taxes, duties, imposts and "excises, to pay the debts and provide for the com- "mon defence and general welfare of the United "States; but all duties, imposts and excises shall be "uniform throughout the United States."

The license tax required by Section 460 of the Penal Code, above quoted, is an excise (*Cooley on Taxation*, page 4).

*Is the license tax such an excise as is required by the Constitution to be "uniform throughout the United States"?*

That the excise is laid and collected "to pay the "debts and provide for the common defence and gen- "eral welfare of the United States," appears from Section 463: "All moneys received for licenses "* * * under this Act shall * * * be covered "into the treasury of the United States." The moneys so collected do not constitute a special fund provided for local purposes, but are "covered into the treasury of the United States" and become part of the general funds of the Federal Government, subject to

appropriation for any purpose which Congress may see fit, within its constitutional restrictions—that is, "to pay the debts and provide for the common defence and general welfare."

Certain taxes imposed by the Act of June 6, 1900, are laid for local purposes and paid into a local depository. Thus Section 32 of Title I of that Act provides: "For each certificate issued to a mem- "ber of the bar, authorizing him to practice law "in the district, a fee of ten dollars shall be paid to "the clerk of the Court, which shall be by him prompt- "ly *remitted to the secretary of the district,* * * * "For each commission issued to a notary public a fee "of ten dollars shall be paid to the secretary of the "district. The fees received by the secretary under "this section and under Chapter Seventy-four of Title "Two *shall be by him retained and kept in a fund* to "be known as the district historical library fund. "The fund thus collected shall be disbursed on the "order of the governor for the purpose of establish- "ing and maintaining the district historical library "fund."

We do not find that any further taxes are laid for local purposes, except such taxes as municipal corporations are authorized to impose (Act of June 6, 1900, Title III, Section 201). All the expenses of the territorial administration are paid by appropriation from the United States treasury. The expenses of erecting

an asylum and caring for the insane are to be paid out of the treasury (Act of June 6, 1900, Title I, Section 2); the salaries of the governor, surveyor-general, judges, marshal, clerks and district attorneys are payable out of the treasury (id., id., Section 10).

By the Act of March 3, 1901, entitled "An Act mak- " ing appropriations for the legislative, executive and " judicial *expenses of the Government,*" etc., appropriation is made "out of any money in the treasury not otherwise appropriated" for the Territory of Alaska for the salaries of these officers and "for incidental and contingent expenses of the territory." The General Appropriation Acts of April 28, 1902, and of February 25, 1903, make similar appropriations.

It is thus apparent that not only do Alaskan license taxes become a part of the general fund, but that the governmental expenses of the territory are considered by Congress as expenses incidental to the general welfare of the United States. Obviously this license tax is an excise required to be uniform throughout the United States.

*Is Alaska a portion of the United States, within the meaning of this provision of the Constitution?*

Section 1891 of the Revised Statutes provides: "The " Constitution and all laws of the United States which " are not locally inapplicable shall have the same force " and effect within all the organized territories, and

" in every territory hereafter organized as elsewhere " within the United States."

The Act of May 17, 1884, entitled "An Act providing a civil government for Alaska," provided: "That the " territory ceded to the United States by Russia by " the treaty of March thirtieth, eighteen hundred and " sixty-seven and known as Alaska, shall constitute a " civil and judicial district, the government of which " shall be organized and administered as hereinafter " provided."

The Act of June 6, 1900, entitled "An Act making " further provision for a civil government for Alaska, " and for other purposes," similarly provided.

This Court has said in *Steamer Coquitlam* vs. *United States* (163 U. S., 346, 352): "Alaska is one of the territories of the United States," and in *Downes* vs. *Bidwell* (182 U. S., 244, 335), Mr. Justice White says: " Without referring in detail to the acquisition from " Russia of Alaska, it suffices to say that that treaty " also contained provisions for incorporation and was " acted upon."

The Constitution having once been extended to a territory cannot be withdrawn, nor its provisions modified by subsequent legislation inconsistent therewith. It becomes the supreme law and operates as a restriction upon the power of Congress to legislate in regard to such territory, identically as it operates to restrict legislation in regard to States. As this Court has said in *Downes* vs. *Bidwell* (182 U. S., 244, 270), referring to

*Springville* vs. *Thomas* (166 U. S., 707): "It was also "intimated that Congress 'could not impart the power "to change the constitutional rule,' which was obvi- "ously true with respect to Utah, since the organic "Act of that territory had expressly extended to it "the Constitution and laws of the United States. As "we have already held, that provision once made "could not be withdrawn. If the Constitution could "be withdrawn directly, it could be nullified indirectly "by acts passed inconsistent with it. The Constitu- "tion would thus cease to exist as such, and become "of no greater authority than an ordinary Act of "Congress."

And in that case it was further said (page 271): "That where the Constitution has been once formally "extended by Congress to territories, neither Congress "nor the territorial legislature can enact laws incon- "sistent therewith."

In the concurring opinion of Mr. Justice White, it is said (page 341): "That whilst in an international "sense Porto Rico was not a foreign country, since "it was subject to the sovereignty of and was owned "by the United States, it was foreign to the United "States in a domestic sense, *because the island had "not been incorporated into the United States, but "was merely appurtenant thereto as a possession.* As "a necessary consequence, the impost in question "* * * was within the power of Congress, and that "body was not, moreover, as to such imposts, con-

" trolled by the clause requiring that imposts should " be uniform throughout the United States." (Our italics.)

By necessary inference, had Porto Rico been incorporated into the United States, Congress would have been controlled by that clause.

Mr. Justice Gray in his concurring opinion says (page 345): "The cases now before the Court do not " touch the authority of the United States over the " territories, in the strict and technical sense, being " those which lie within the United States, as bounded ' by the Atlantic and Pacific oceans, the Dominion of " Canada and the Republic of Mexico, and the terri- " tories of Alaska and Hawaii; but they relate to ter- " ritory, in the broader sense, acquired by the United " States by war with a foreign state."

The dissenting opinion of Mr. Justice Harlan is to the effect that Porto Rico, after the ratification of the treaty of Spain became an integral part of the United States, and in this case when the premise that Alaska is such a part of this country is firmly estab lished by the decisions of this Court, the conclusion at which he arrives is authority. He says (page 391): " In my opinion Porto Rico became, at least after the " ratification of the treaty with Spain, a part of and " subject to the jurisdiction of the United States in " respect of all its territory and people, and Congress " could not thereafter impose any duty, impost or ex- " cise with respect to that island and its inhabitants,

1844



"which departed from the rule of uniformity estab-
"lished by the Constitution."

In the premises it is respectfully submitted that the judgment of the District Court be reversed.

J. C. CAMPBELL,
W. H. METSON,
Attorneys for Plaintiff in Error.

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Clerk.

# In the Supreme Court of the United States.

OCTOBER TERM, 1903.

JOSEPH R. BINNS, PLAINTIFF IN ERROR,
*v.*
THE UNITED STATES. } No. 196.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.*

## BRIEF ON BEHALF OF THE UNITED STATES.

MILTON D. PURDY,
*Assistant Attorney-General.*

18449

# In the Supreme Court of the United States.

OCTOBER TERM, 1903.

JOSEPH R. BINNS, PLAINTIFF IN ERROR,
*v.*
THE UNITED STATES. } No. 196.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.*

## STATEMENT OF THE CASE.

This case presents the question as to whether the act of Congress of March 3, 1899 (30 Stat., 1253, 1336), as amended June 6, 1900 (31 Stat., 321, 330), imposing license fees for prosecuting certain specified lines of business and trade in the Territory of Alaska, is constitutional.

The same question was before this court at the last term in the so-called Alaskan license cases, which are reported in the 187 U. S., 447, 454, 455, and 466. This court, however, in those cases, deemed it unnecessary to pass upon the constitutionality of this law, for the reason that the court below properly decided the cases upon other grounds.

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The plaintiff in error, Joseph R. Binns, was arrested at the city of Nome, Alaska, on the 8th day of January, 1902, upon a warrant issued by United States Commissioner T. M. Reed, *ex officio* justice of the peace. (Record, p. 2.) The warrant of arrest was based upon a written complaint made by one W. N. Landers upon oath before said commissioner on the 4th day of December, 1901, wherein the said Joseph R. Binns was charged with having wrongfully and unlawfully prosecuted and carried on the business of a transfer company without first applying for and obtaining a license so to do from the district court of the district of Alaska, second division, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America. (Record, p. 1.) The defendant was thereupon arraigned before the commissioner, and entered a plea of not guilty. On the 14th day of January, 1902, a jury trial not having been demanded by the defendant, the case was submitted to the commissioner upon an agreed statement of facts. (Record, p. 3.) On the 17th day of January, 1902, the commissioner found the defendant guilty of the offense charged in the complaint, and sentenced him to pay a fine of $10 and the costs of the action, and be imprisoned in the district jail until such fine and costs were paid, not exceeding ten days. (Record, p. 4.) The case was thereupon appealed from the judgment of said commissioner to the United States district court for Alaska, second division. (Record, p. 6.) On the 15th day of March, 1902, the case was called for trial before said district court, whereupon Mr. Fink,

the attorney for the defendant, stated that he and the district attorney would agree upon a statement of facts and would submit the case to the court for its decision. (Record, p. 7.) On March 22, 1902, Mr. Orton, one of the attorneys for the defendant, stated in open court that the defendant was willing to admit that all of the facts alleged in the complaint were true (Record, p. 7), and on the same day filed in the office of the clerk of said court the following pleading, which, while purporting to be an "Answer and plea" to the complaint, is substantially a demurrer (Record, pp. 7 and 8):

> In the United States district court for the district of Alaska, second division, on appeal from the United States commissioner's or justice's court for the precinct of Nome, second division, district of Alaska.
>
> UNITED STATES OF AMERICA, PLAINTIFF,
> *v.*
> JOSEPH R. BINNS, DEFENDANT.
>
> Comes now the defendant in the above-entitled action and answering and pleading to the complaint herein, admits that on the 4th day of December, 1901, in the district of Alaska, second division thereof, he did prosecute and carry on the business of a transfer company without first paying for and obtaining a license so to do from the district court of the district of Alaska, second division thereof; but the said defendant further shows to the court and alleges that section 460 of the act entitled "An act to define and punish crimes in the district of

Alaska, and to provide a code of criminal procedure for said district," approved March 3, 1899, as amended by section 29 of the act entitled "An act making further provisions for a civil government for Alaska, and for other purposes," approved June 6, 1900, under which said section the defendant is proceeded against herein is unconstitutional and void by reasons of the provisions of paragraph 1 of section 8 of Article I of the Constitution of the United States, which reads as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

Wherefore the defendant prays to go hence dismissed without day.

ALBERT FINK,
IRA D. ORTON,
JAS. W. BELL,
*Attorneys for Defendant Binns.*

On the 20th day of May, 1902, the United States district judge for the district of Alaska, second division, a jury trial having been expressly waived by the defendant (Rec., p. 10), and the case having been submitted to the court for its decision upon the answer or demurrer above quoted, found the defendant guilty as charged in the complaint of the offense of carrying on the business of a transfer company without having obtained a license so to do, and ordered and adjudged

that he pay a fine in the sum of $50 and costs. (Rec., pp. 11 and 12.)

The various provisions of the Alaska Criminal Code authorizing the prosecution of persons charged with a misdemeanor in the Territory of Alaska before United States commissioners, and providing for appeals in such cases to the district court, and the waiver of a jury trial, will be found under their appropriate headings in Appendix A to this brief.

The case is brought to this court on a writ of error directed to the United States district court for the district of Alaska, second division (Record, p. 16), and the provision of law authorizing such appeal is contained in section 202 of the act of March 3, 1899 (30 Stat., 1253, 1307). See Appendix A.

### CONTENTION OF THE PLAINTIFF IN ERROR.

It is contended by counsel for the plaintiff in error that section 460 of the act of March 3, 1899, as amended by the act of June 6, 1900, imposing license fees for prosecuting certain specified lines of business and trade in the territory of Alaska, is unconstitutional for the reason that such law imposes a tax in disregard of the constitutional rule of uniformity.

### CONTENTION OF THE GOVERNMENT.

The Government contends that such law is constitutional for the reason that Alaska is territory *belonging to the United States*, and that Congress is authorized to impose these license fees not by reason of the general power of taxation provided for in article I, section 8, of

the Constitution, but from the plenary power "to make all needful rules and regulations respecting the territory or other property belonging to the United States" (Article IV, section 3, paragraph 2), and that the exercise of such power is not subject to the provisions limiting the general power of taxation either as to apportionment or uniformity.

## LEGISLATIVE HISTORY OF ALASKA PRIOR TO THE ENACTMENT OF THE CODE OF CRIMINAL PROCEDURE OF MARCH 3, 1899.

Before entering upon a discussion of the constitutional question here presented, the legislative history of Alaska should be briefly considered for the purpose of showing that the power to govern Alaska has ever been regarded by Congress as within the Territorial clause of the Constitution. In this connection I can do no better than resubmit that portion of the Government's brief in the Alaskan license cases wherein the political relations which have existed from time to time between that Territory and the United States are admirably set forth.[a]

Alaska was ceded to the United States by the treaty of June 20, 1867. (15 Stat. L., 539; see Appendix B.) Before that time it had been occupied and arbitrarily governed by a fur-trading Russian corporation, known

[a] In view of the fact that the constitutional question involved in this case was elaborately argued before this court in the Alaska license cases, I shall take the liberty of reproducing in this brief numerous verbatim extracts from the Government's briefs submitted in those cases without further acknowledgment. The presentation of the argument has been somewhat rearranged, introducing considerable new matter and suggesting some new points.

as the Russian-American Company. (*Kinkead* v. *United States*, 150 U. S., 483, 490; Appendix B.)

On July 27, 1868 (15 Stat. L., 240; Appendix B), the laws of the United States relating to customs, commerce, and navigation, so far as applicable, were extended to and over Alaska, and the Territory was constituted a customs collection district, with a port of entry at or near Sitka. By section 4 the President was authorized to prohibit the importation and use of firearms, ammunition, and distilled spirits in Alaska. The power given him was of the broadest character, authorizing the seizure and forfeiture of all such commodities exported from any part of the United States and destined for Alaska, as well as the seizure and forfeiture of the vessel conveying them. The taking of fur-bearing animals was prohibited and violations of law were to be prosecuted in the United States courts for Oregon, California, or Washington.

By the act of July 1, 1870 (16 Stat. L., 180), provisions were made to prevent the extermination of fur-bearing animals in Alaska. A limitation was placed upon the number of seals which might be killed for their skins upon the islands of St. Paul and St. George. The right to take fur skins there was to be leased and an annual rental paid for the privilege. And it was also provided that in addition to the rental "a revenue tax or duty of $2 is hereby laid on each fur-seal skin taken and shipped from said islands during the continuance of such lease, to be paid into the Treasury of the United States." The major part of the revenue

collected in Alaska has come from this source, the annual receipts amounting to over $225,000.

Thus the matter remained until the passage of the act of May 17, 1884 (23 Stat. L., 24; Appendix B), which for the first time provided any system of government for Alaska. The act of 1884 constituted Alaska a civil and judicial district (not a Territory), with a seat of government at Sitka. A governor was provided, charged with the interests of the United States arising in the district, with authority to see that the laws are enforced, to whom was given power to grant reprieves pending the action of the President. A district court was established, with civil and criminal jurisdiction of district courts of the United States, and such other jurisdiction as might be established by law. Two terms of court each year were provided and the judge was given authority to make allowances for the necessary expenses of his court. Four commissioners were provided with the civil and criminal jurisdiction of justices of the peace in Oregon, also with testamentary and probate jurisdiction, and with authority to grant writs of habeas corpus returnable before the judge. Fines and forfeitures received by them were to be paid over to the clerk of the district court. A marshal was provided, with authority to appoint four deputies with not only the duties of deputy United States marshals, but those of constables under the laws of Oregon.

The general laws of Oregon were made the law of the district so far as applicable. Writs of error in

criminal cases were to issue from the United States circuit court for Oregon.

The provision of this act to which special attention should be directed is that contained in section 4, which provided:

> That a clerk shall be appointed for said court *who shall be ex officio secretary and treasurer of said district.* * * * The clerk shall record and preserve copies of all the laws, proceedings, and official acts applicable to said district. *He shall also receive all moneys collected from fines, forfeitures, or in any other manner* except from violations of the customs laws, *and shall apply the same to the incidental expenses of the said district court and the allowances thereof, as directed by the judge of said court,* and shall account for the same in detail, and for any balances on account thereof, quarterly, to and under the direction of the Secretary of the Treasury.

Thus the clerk was made the treasurer of Alaska. All moneys collected there were to be turned over to him, and he was given authority to apply them to the incidental expenses of the court—the court which, it is to be observed, provided, with its officers, practically all the machinery of government in force in Alaska.

While it is true that under the provisions of the act of May 14, 1898 (30 Stat. L., 409), the homestead laws were extended to Alaska and provisions made for the granting of rights of way for railroads, wagon roads, and tramways, as well as for the purchase of land and

timber upon certain conditions, the machinery of government provided by the act of 1884 remained in force at the time of the passage of the act of March 3, 1899 (30 Stat. L., 1253), "To define and punish crimes in the district of Alaska and to provide a code of criminal procedure for said district." Alaska had no Territorial form of government, no legislature of its own, no treasury of its own, no revenue of its own, no appropriations of its own. Practically it was governed by the court; its only treasurer was the clerk of the court; its only local revenues the moneys paid to the clerk as treasurer; and substantially its only appropriations the authority on the part of the clerk to pay out of these receipts the incidental expenses of the court.

Attention is particularly directed to the fact that the local expenses of Alaska, expenses provided for in organized Territories by local taxation, were neither borne by Alaska itself or specially appropriated for by Congress, but were met by the different departments of the Government through the use of general appropriations expended by agents located in Alaska.

In 1897 and 1898 the great rush to Alaska and the Klondike began. Adventurous men from all parts of this country and of the world hurried there. Not simply the hardy and daring, but the reckless and lawless were attracted. The law prohibiting the importation and use of liquor became a dead letter. Many occupations were used for purposes of fraud and extortion. There was a pressing need of regulation and supervision. Legislation was imperatively demanded.

As a result, the formulation of not only a criminal but a civil code was begun.[a]

## POINTS AND AUTHORITIES.

### I.

**The power to impose these license fees is not derived from the general power of taxation provided for in Article I, section 8, of the Constitution, but from the plenary power "to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States." (Art. IV, sec. 3, par. 2.) The exercise of such power is therefore not subject to the provisions limiting the general power of taxation as to apportionment and uniformity.**

In considering the constitutionality of the law here under discussion it is manifestly unnecessary to ascertain or attempt to define the precise political relations existing between the Territory of Alaska and the Federal Government. That Alaska is territory belonging

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[a] Men came from Maine, Texas, Minnesota, and Dakota, and from all the mining regions of the Rocky Mountains. Some had well-matured ideas and plans, and were going with the intention to prospect and mine. Some were of the sporting class and intended to gamble and get through on their wits. The fever was in the air and the blood. It was, as Petrucio says:

> "Such wind as scatters young men through the world,
> To seek their fortunes farther than at home,
> Where small experience grows."

Large outlays were made for gambling furniture, theatrical outfits, liquors of all kinds, tobacco in every variety. Variety performers, indifferent, bad, and very bad, were in evidence. Prostitutes under various guises and under no guise at all joined the rush. * * * This stampede to Nome is unique. There is nothing in the history of the country like it. The arrivals on the ocean vessels to July 15 were 18,000 souls. One hundred and sixty-two steamships and 70 sailing vessels arrived up to August 1. (Report of governor of Alaska, 1900.)

See also History of Alaska, Bancroft. Reports of the governors of Alaska, 1901, 1902, and 1903.

to the United States is settled beyond controversy, and that Congress has plenary powers, national and municipal, federal and state, over all the Territories, so long as they remain in a Territorial condition, has been decided in numerous opinions of this court.

*American Insurance Co.* v. *Canter*, 1 Pet., 511, 542;
*Benner* v. *Porter*, 9 How., 235, 242;
*Cross* v. *Harrison*, 16 How., 164, 193;
*National Bank* v. *Yankton County*, 101 U. S., 129, 133;
*Murphy* v. *Ramsey*, 114 U. S., 15, 44;
*Mormon Church* v. *United States*, 136 U. S., 1, 42, 43;
*McAlister* v. *United States*, 141 U. S., 174, 181;
*Shively* v. *Bowlby*, 152 U. S., 1, 48;
*Downes* v. *Bidwell*, 182 U. S., 244;
*Hawaii* v. *Mankichi*, 190 U. S., 197.

If Congress, therefore, has plenary power to make all needful rules and regulations for the government of the Territory of Alaska, we have only to inquire as to whether the particular law here under discussion was enacted by Congress as a needful regulation for the government of that Territory, and in support of this contention I submit the three following propositions:

**1. The license fees imposed by this law are a part of a penal code, and in the nature of police regulations, which, in the judgment of Congress, are necessary for the government of the Territory of Alaska by reason of its social conditions.**

Inasmuch as Congress, when enacting laws for the government of the Territories, is invested with all

powers, both national and municipal, federal and state, it must necessarily follow that Congress has the power to pass laws in the nature of police regulations. We will, therefore, first consider this law as a police regulation, without regard to the revenue which must necessarily accrue from its enforcement.

Neither the title nor the body of the act nor the particular provisions under consideration suggest the ordinary taxing statute. The act (31 Stat., 1253) is entitled: "An act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for said district."

Its first section constitutes a political subdivision which it calls the "district of Alaska." Then follows an elaborate penal code for the government of its inhabitants, and as an incident to such penal code the paragraph now under consideration was inserted, requiring any person, corporation, or company to obtain a license before prosecuting, or attempting to prosecute, any of the occupations referred to in said paragraph. It is significant, moreover, that the collection of these fees is not left to the collector of customs or of internal revenue, as ordinary excise taxes always are, but are payable to and collected by the clerks of the Alaskan courts.

When regard is had to the peculiar social conditions in Alaska, it is clear that these provisions are intended primarily for the purposes of police regulation, and that the revenue to be derived therefrom is only incidental in nature. The small population of whites had been suddenly increased by the discoveries of gold in

the Klondike, and, as in the case of California, an extraordinary rush of adventurers and fortune hunters from all parts of the world had followed.

It is obvious that with such an invasion of men who, in many instances, were irresponsible adventurers, it was necessary that there should be some governmental supervision of those who should embark in business, and Congress deemed it wise to vest such supervision in the judicial department of the Government by providing, in section 463, that every person, corporation, or company which intended to embark in business, of the kinds mentioned in the act, should apply to the court for a license, and that the granting of this license should be the subject of recommendations or remonstrances by the citizens of Alaska; and that the court, having due regard to such recommendations or remonstrances, should grant or refuse the license in question. This is obviously a police regulation, and differs wholly from the ordinary licenses of the United States internal revenue, which, as stated in the License Cases (5 Wallace, 462), are not licenses in the proper sense of the term, but simply the method of collecting the annual tax. *In Alaska, however, the supervision of the business through a license is the primary purpose of the act, and revenue is but an incident,* whereas with the ordinary liquor licenses under the internal-revenue system revenue is the primary purpose and the license an incident to it.

In the case of *Wiggins Ferry Company* v. *East St. Louis* (107 U. S., 365) a license fee imposed by the State of Illinois upon a domestic corporation for the

privilege of running a ferry between a point in that State and a point in Missouri was under consideration. As to the nature of such a license fee this court said:

> The power to license is a police power, although it may also be exercised for the purposes of raising revenue. We can not say, as a matter of law, that when a municipal corporation is authorized "to regulate, tax, and license ferryboats" the imposition of a license fee of $100 per boat is not within the power to regulate and license, and is consequently not within the police power.

Again, page 375, the court say:

> The power of the State of Illinois to authorize any city within her limits to impose a license tax on trades or callings generally, especially those which are quasi public, can not be disputed. Draymen may be compelled to pay a license tax on every dray owned by them, hackmen on every hack, tavern keepers on their taverns in proportion to the number of rooms which they keep for the accommodation of guests. We do not think that the Constitution of the United States, by the section which prohibits a State from laying a duty of tonnage, protects the keeper of a ferry from a similar tax upon the boats which he employs. Whether a license fee is exacted under the power to regulate or the power to tax is a matter of indifference if the power to do either exists. The license fee exacted is, in effect, laid upon the business of keeping a ferry; for it is not laid

> upon all boats owned by the ferry keeper, but only on those plying between the two banks of the river, and is graduated by the number of boats used by him.

It is true that in this case the constitutionality of a state statute was under consideration, but in legislating for Alaska, Congress has all the powers both of the Federal Government with respect to the States and of the State governments with respect to their domestic concerns. See also *Ficklen* v. *Shelby County*, 145 U. S., 1, 23, and *Munn* v. *Illinois*, 94 U. S., 113.

The licensing of persons to sell liquor is not an exercise of the taxing power of the State to raise revenue, but of the police power for the regulation and restriction of a dangerous business; it follows that the adjustment of fees for the license is not governed by the constitutional provisions requiring equality and uniformity of taxation. Black on Intoxicating Liquors; *Thomason* v. *State*, 15 Ind., 449. See also Black on Intoxicating Liquors, sec. 108, and cases there cited; also sections 109 and 179; *Lovingston* v. *Board of Trustees*, 99 Ill., 564.

In *Thomasson* v. *State* (*supra*) a license fee of $50 had been imposed by an act of the legislature of Indiana as the consideration for the privilege of selling liquor. It was held to be void under a provision of the constitution of Indiana which provides that taxation shall be uniform. The court held otherwise, saying:

> It is claimed that the fee for license, $50, is a tax upon a particular pursuit, and as such is

prohibited by section 1 of Article X of our constitution, providing for a uniform rate of taxation. But it has been decided that that section relates to the general levy alone. (*The Bank* v. *The City of New Albany, supra; Anderson* v. *The Kerns Draining Company*, 14 Ind., 199.) See, as to unlimited taxing power, Ind. Dig., sec. 16, p. 761. The license upon retailing is an excise. (1 Story on the Const., p. 670.)

An excise is an indirect tax; but in this case taxation was not the object of imposing it, and the legislature was not bound to appropriate its proceeds to any object for which the State is forbidden to raise money by local or special taxation. It was imposed in the exercise of the rightful police power of the State, and is an incident of a legitimate police regulation. Hence, it is not within the prohibition of the twenty-second section of the fourth article of the constitution, prohibiting local and special taxation for State purposes. (See 7 How., 283; 2 Story on the Constitution, p. 10 et seq.)

In *Lovingston* v. *Board of Trustees* (99 Ill., 564) a similar license fee for the sale of liquors was held not to be a tax within the constitutional provision of the State of Illinois requiring equality and uniformity. The court says:

> But it is next urged that these license fees are a tax, and they are illegal because they are not uniform. We have been unable to find anything from which it may be inferred that the fees received from dramshop licenses by the city were not uniform in amount and the period

for which they were to run. This would seem to be a complete answer to that position.

In the cases of *The People* v. *Thurber* (13 Ill., 554) and *East St. Louis* v. *Wehrung* (46 id., 392) it was held that a fee received for a license granted by a municipal corporation, authorizing the sale of liquor, was not a tax, in a constitutional sense, and not being a tax in that sense it did not violate the constitutional requirement of equality in the levy of taxes.

The power exercised in providing this system of police supervision is, therefore, not the general taxing power under Article I, section 8, but is referable to the distinct power under Article IV, section 3, of providing "needful rules and regulations respecting the territory or other property belonging to the United States." It is, therefore, unrestricted as to uniformity.

*The Constitution requires uniformity of taxation, but does not require uniformity of police supervision. The power of Congress to adapt its police regulations, or, to use the term of the framers of the Constitution, its "needful regulations," to the peculiar conditions and needs of each separate territory seems clear. The framers wisely avoided any attempt to create uniformity where uniformity was impossible.*

If, therefore, this paragraph 460 can be clearly held to be, in common with the other provisions of this act, a needful regulation of a police character rather than a revenue statute, even though as a mere incident to such police regulation license fees are exacted, then it is constitutional, and, to use the words of Mr. Justice White

(*Downes* v. *Bidwell*, 182 U. S., 292), it "is not to be measured by the provision empowering Congress 'to lay and collect taxes, duties, imposts, and excises,' and is not restrained by the requirement of uniformity throughout the United States."

It is true that Mr. Justice White had reference in these words to a levy of "local taxes for local purposes within the territories," but the underlying principle to which I understand him to give utterance is that if a given exercise of legislative power is referable and justified by the power to make needful regulations, even though it incidently has the characteristics of taxation, it is not subject to a restriction imposed upon the *general* powers of taxation. The two powers are independent, and if the present provision be a "needful regulation" it is justified without respect to the taxing clause of the Constitution.

**Congress has the power to license various trades and occupations in the Territories independently of and apart from the power to tax, and the mere fact that revenue is derived as an incident to the exercise of such power will not operate to characterize the license fee as a tax.**

**(a) THE LICENSE-TAX CASES.**

The distinction between a license which grants authority to engage in a particular business, and thus confers a privilege, and a tax which grants no such authority, and therefore confers no privilege, was clearly drawn in the *License-Tax Cases* (5 Wall., 462), wherein the court held that the so-called license tax imposed by the United States upon the liquor business

did not provide a license, but merely a tax collected in the form of a license. The court pointed out that the license issued by the General Government conferred no authority to engage in the liquor business in the several States, because Congress had no power to regulate occupations carried on within the States. The court, speaking by Chief Justice Chase, said (p. 470):

> It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms.
>
> Thus Congress, having power to regulate commerce with foreign nations and among the several States and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other license necessary or proper for the exercise of that great and extensive power; and the same observation is applicable to every other power of Congress to the exercise of which the granting of licenses may be incident. All such licenses confer authority, and give rights to the licensee.
>
> But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution except such as is

> strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject.

The court therefore reached the following conclusion (p. 471):

> But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits they give none, and can give none. * * * The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law if he pays it.

### (b) THE REVENUE FEATURE.

Passing to the revenue feature, it is asserted that so much money is raised that the measure must be regarded as one for revenue only. In this connection let me refer to what the supreme court of Ohio said in two leading cases on the subject of license taxes. In each of these cases the license tax was assailed on the ground that it violated the uniformity clause of the Constitution, in that it was a tax for general revenue and was not uniform. Respecting the power and policy of licensing certain occupations, Judge Gholson, in the case of *Baker* v. *Cincinnati* (11 Ohio St., 534), said (p. 543):

> We think that the power to prohibit certain things to be done, unless a license be obtained, and to charge for such license, in many instances of its exercise, stands on the same principle as

an assessment. An assessment stands on a principle of benefit to property; a charge for a license may be made in view of the special inconvenience and expense to the government, for the benefit of the individual who asks for the license. Things licensed may be such as should only be permitted under the regulation or supervision of public functionaries. The tax or charge may have reference to such regulation and supervision * * * *To say that it is a tax and goes into the public treasury does not disprove this object.*

And in *Marmet* v. *State* (45 Ohio St., 63) Judge Spear said (p. 70):

> *Whether the authority to enact laws of the character of the one in question shall be regarded as based upon the police power of the Government, or upon the taxing power is, perhaps, not of the greatest importance, provided the power is found to exist. We have the best of authority for the oft-repeated aphorism "there is no magic in names."* The enactment provides for the regulation of relative rights, privileges, and duties as between individuals, for the conservation of order and the discouragement of pernicious employments, or of such as may become so, thus keeping its object apparently within the attributes of police power (Cooley on Taxation, 586); but we need not concern ourselves with nice and finely drawn distinctions. Both the police and the taxing power, including power of assessment, are included within the general legislative power vested by our constitution in the general assembly.

**(e) CONGRESS COULD NOT MAKE THESE LICENSES UNIFORM THROUGHOUT THE UNITED STATES.**

These are clearly licenses, and therefore clearly local. In granting them the court must consider local conditions, and grant or refuse in view of such conditions. Now, the objection on the other side is that these license taxes are not uniform throughout the United States. But how could Congress make such local regulations uniform throughout the United States? How could Congress provide that all these occupations should also be licensed throughout the United States, in all the States? It would not only be impracticable, but clearly violative of the Constitution. Such occupations can be regulated and licensed within the States only by the States themselves.

**2. If taxes at all, these license fees are local taxes imposed by Congress as the legislature of Alaska, and paid into the Treasury of the United States as the only treasury of Alaska, and obviously intended to meet the expenses of governing that Territory.**

Even though these license fees are held to be taxes within the strict sense of that term, yet they are local taxes and are, therefore, not a tax within the meaning of Article I, section 8, for, as Mr. Justice White said in *Downes* v. *Bidwell* (182 U. S., 292):

> *As Congress derives its authority to levy local taxes for local purposes within the Territories, not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empow-*

*ering Congress "To lay and collect taxes, duties, imposts, and excises," and is not restrained by the requirement of uniformity throughout the United States.*

As was said in *Gibbons* v. *District of Columbia* (116 U. S., 404):

> The power of Congress, legislating as a local legislature for the District (Columbia), to levy taxes for District purpose only, in like manner as the legislature of a State may tax the people of a State for State purposes, was expressly admitted, and has never since been doubted. (5 Wheat., 318; *Welch* v. *Cook*, 97 U. S., 541; *Mattingly* v. *District of Columbia*, id., 687.) In the exercise of this power Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exemp certain classes of property from taxation, or may tax them at a lower rate than other property.

If, therefore, a reasonable interpretation of the legislation in question will make the tax in question local in character, that construction will be favored and adopted and the act sustained. To construe these license fees as local taxation (if taxation at all) seems to me reasonable, when it is remembered the conditions for which Congress was legislating.

As has been said, the only legislative body in Alaska is Congress, and similarly the only executive in Alaska is the national executive acting through its local appointees. *Alaska has no distinct treasury and no officer known as treasurer.* As the Congress sitting at Washington is the legislature, so the Treasury Department,

1846



located in Washington, is the treasury of Alaska, and Congress presumably knew this when it passed the act of 1899. As will appear from the tables hereto appended,[a] Congress has for many years spent large sums of money in Alaska for the benefit of its inhabitants, for which it has received no adequate return in the form of taxes, and the appropriations for Alaska have always exceeded the revenue derived from its people. Prior to the act of 1899 the people of Alaska, although provided with an inchoate form of government distinct from the National Government, made no return therefor in the shape of taxation. In common with the other inhabitants of the States and Territories, they paid the ordinary internal revenue and tariff duties, for which they shared those privileges of the General Government which are common to all the citizens of the Republic, but for the local government which was established for their immediate benefit they made no direct return in the shape of local taxation, and this notwithstanding that Congress was expending large sums of money in policing the district, establishing courts, protecting its industries, and otherwise promoting the welfare of its inhabitants. Assuming, therefore, that the license fees in question had any other purpose beyond the "needful regulation" of the occupations in Alaska, it is obvious that they were intended to meet the expenses of administering the act for the local government of Alaska, of which act the license

[a] See Appendix C.

fees are a part. It may be said, however, that Congress did not in words restrict the expenditure of the taxes thus collected to local purposes, but for this there were two reasons. In the first place, there was no separate treasury of Alaska into which the license fees could be paid; and in the second place, Congress may well have assumed from the facts within its possession that as the appropriations for Alaska were in excess of any possible receipts from these license fees, that the moneys thus raised were in fact expended locally within the Territory, for the Government was thus recouping itself for a great drain upon the general funds. If so spent in fact, is it important whether the fund was especially earmarked, especially when the only treasury into which the taxes could be paid and held was the general Treasury of the United States? Such construction is strengthened when it is remembered that by the legislation of the subsequent year one-half of said local fees were expressly appropriated for school purposes within the district. There being no local treasury in Alaska, Congress could have done no more, except to expressly provide that all of these license fees should be appropriated for and spent in Alaska, but if such an intent may be fairly gathered from the act as a whole, will not the court favor the construction which saves the constitutionality of the legislation in question? This view is further supported by the fact that these license fees are imposed as a part of a penal code and are obviously intended to meet the expenses of its administration.

Whatever be the theory, the fact is (as appears from Exhibit C) that all of the moneys that have been raised by these license fees, or by any other means in Alaska, have been expended by the United States in that district for the benefit of its people.

Had Congress regarded these taxes as general excise taxes it would presumably have left the collection of the inland excises to the internal-revenue department, which collects other internal-revenue duties, and the shipping duties to the collector of customs. On the contrary, the act expressly provides that the clerk of the court shall receive the money and pay the same into the general Treasury. It is therefore obvious that these license fees were not regarded as internal-revenue duties or as a part of the general revenues of the Government. In imposing upon the clerks of the district courts the duty of their collection, their distinctive and local character as a fund apart from the general revenues of the Government is emphasized.

If the court will favor any reasonable construction that will sustain the constitutionality of the legislation, then I submit it should favor a construction of the act of Congress now under consideration which interprets its true meaning to be that the license fees imposed by said act are levied and collected for the benefit of the people of Alaska and to be expended therein. If Alaska had a local treasury this construction would not be so apparent; but I submit that where there is no local treasury, the mere fact that local taxes are paid into the general Treasury of the United States

(that being the only treasury of Alaska) does not rebut the fair presumption under our constitutional system that local taxes are intended for local purposes only, and that reasonable presumption is strengthened by the fact that Congress presumably knew that the appropriations for the local government in Alaska exceeded and would exceed the amount raised from local and general taxation in this unorganized territory.

**DIVERSION OF LICENSE FEES TO SCHOOL PURPOSES.**

And at this point it may be well to call attention to the fact that in the civil code, enacted in 1900, under the chapter providing for the incorporation of certain towns, it was enacted that 50 per cent of the moneys collected from licenses in such towns should be turned over to the town treasurer for use for school purposes (31 Stat. L., 521). And the next year, 1901, this section was amended so as to provide that if the 50 per cent of the license fees were not needed for school purposes in the municipality the balance might be expended for general municipal purposes (31 Stat. L., 1438). And in this amendment there was included a further provision that 50 per cent of all license fees collected outside of incorporated towns should be turned into the Treasury of the United States and placed at the disposal of the Secretary of the Interior for use for school purposes in Alaska outside of incorporated towns.

By the amendment of March 2, 1903 (32 Stat., 946), *all* of the license fees received for business carried on within incorporated towns shall be paid over to the

corporation for school and municipal purposes; and 50 per cent of the amount received outside of incorporated towns to be deposited in the Treasury to be expended under the direction of the Secretary of the Interior for school purposes outside of incorporated towns.

**3. Admitting, for the purpose of the argument, that these license fees are local taxes imposed by Congress in the Territory of Alaska and appropriated by Congress to the support of the General Government, we assert that such a law would be constitutional under the plenary power of Congress to govern the Territories.**

While, as has already been shown, there can be no question but that the license fees collected under this act of Congress if taxes at all are local taxes devoted by Congress for local purposes, the point is made that, because the moneys are covered into the Treasury of the United States, from which it follows that Congress might appropriate such moneys for general purposes, necessarily operates to make the law unconstitutional. If Congress has the power to tax the Territories without reference to the general taxing power contained in Article I, section 8, of the Constitution, it is difficult to perceive in what manner such power is restricted to a tax levied by Congress in Territories *for local purposes only.* Certainly there is no express provision of the Constitution which prohibits Congress, when taxing under the territorial clause, from covering into the Treasury of the United States the proceeds derived from such local tax, and subsequently appropriating such moneys for general

governmental purposes. The Territories, as we have heretofore shown, are unquestionably property belonging to the United States. Congress has the power either to dispose of such territory or to make needful rules and regulations for its proper government, and if such regulations include the power to tax which results in revenue to the General Government, where is to be found the constitutional restriction upon the power of Congress to cover such revenue into the General treasury, and to appropriate the same for the payment of the debts of the General Government? Congress under the general taxing clause of the Constitution has the power to levy taxes uniform throughout the United States, and to apply the proceeds for the benefit of any Territory belonging to the United States, and it has never been considered that the use of the money so collected from the people of all the States, and appropriated for the benefit of a particular Territory, is in any way violative of the rights of the people residing in the States from which such money was collected. Why should the reverse of the proposition be regarded as unconstitutional? The people of all the States spend their money, under the direction of Congress, for the benefit of a particular Territory, and there is no express provision in the Constitution requiring Congress when taxing in a Territory to appropriate the money so collected for the sole and exclusive benefit of such Territory. Nor, in my judgment, does the Constitution contain by necessary implication such a restriction upon the power of Congress to tax in the Territories.

So far as we have been able to ascertain, Congress has never attempted to tax the Territories under the Territorial clause of the Constitution *except for local purposes*, which fact, possibly, has given rise to the idea that Congress, in levying local taxes in the Territories, is restricted to taxing for local purposes, but it is difficult to appreciate the logic which would sustain a tax as constitutional if assessed and collected by Congress for local purposes, but which tax having been collected would become unconstitutional if devoted by Congress subsequently to the payment of the public debts of the United States. We therefore contend that even admitting arguendo, that these license fees are local taxes laid and collected for the support of the General Government; that the law which authorizes their assessment and collection for such purposes is a constitutional exercise of the taxing power of Congress under the Territorial clause of that instrument.

Mr. Justice White, in his concurring opinion in *Downes* v. *Biddle* (182 U. S., 244, 299), said:

> The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation—*for, whether the tax was local or national, it could have been imposed, although Porto Rico had no representative local government and was not represented in Congress*—but is whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?

## II.

**Section 418 of the Code of Criminal Procedure of Alaska, permitting the defendant to waive a jury trial in the prosecution of all offenses triable in a justice court, is constitutional.**[a]

While this question is not raised by the assignments of error, in view of the fact that this court, of its own motion, as I am informed, in the so-called oleomargarine cases, argued and submitted at this term of the court, inquired into the power of a Federal court to permit a defendant to waive a jury trial and have the issue tried by the court, we have deemed it appropriate to refer briefly to certain principles of law which clearly distinguish this prosecution from prosecutions conducted under the Federal laws within the States.

We have heretofore demonstrated that Congress in legislating for Alaska is invested with plenary powers, including the power to enact police regulations analogous to, if not identical with, those ordinances and by-laws which a municipality may pass for the regulation of the various trades and callings carried on within its boundaries. And whatever may be said with reference to the nature of other offenses cognizable before justices of the peace in the Territory of Alaska under the code of criminal procedure, it is manifest that the license fees imposed by section 460 of that act are in the nature of municipal by-laws. Section 461 authorizes the justice before whom the trial is had, upon conviction, to fine the offender in a sum equal to the

[a] See Appendix A for the various provisions of the Alaska Code of Criminal Procedure relating to waiver of a jury trial before justices of the peace in criminal cases.

license required for the business, trade, or occupation, and for the second offense a fine equal to double the amount of the license so required, while for the third offense the court may impose a fine in three times the amount of the license so required and imprison the offender for a period of not less than thirty days nor more than six months.

It will be observed that so far as appears from this record the defendant was convicted for "*a first offense*," and the court therefore, under the law, only had power to impose a fine in the sum of $50. It will, therefore, be unnecessary to go into the question as to whether that portion of the law which authorizes the court upon a third conviction to *fine and imprison* removes such a case from that *class of petty offenses*, which at the time of the adoption of the Constitution were both in this country and in England generally triable in a summary manner by the court without a jury. In other words, the Government contends that this prosecution belongs to that class of petty or minor offenses not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury.

And, in support of this contention, we submit the following authorities for the consideration of this court:

**Callan v. Wilson, 127 U. S., 540.**

In this case Mr. Justice Harlan, in delivering the opinion of the court, after pointing out that the third article of the Constitution embraces not only felonies, but some classes of misdemeanors the punishment of

which involves, or may involve, the deprivation of the liberty of the citizen, said (p. 555):

> Without further reference to the authorities, *and conceding that there is a class of petty or minor offenses not usually embraced in public criminal statutes, and not of the class or grade triable by common law by jury, and which, if committed in this district, may, under the authority of Congress, be tried by the court and without a jury*, we are of opinion that the offense with which the appellant is charged does not belong to that class. A conspiracy such as is charged against him and his codefendants is by no means a petty or trivial offense.

And again (p. 557):

> *Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose*, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name or by the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment and in whatever court he is put on trial for the offense charged.

**Hallinger v. Davis (146 U. S., 314).**

Mr. Justice Shiras, in delivering the opinion of the court, said (p. 318):

> Upon the question of the right of one charged with crimes to waive a trial by jury, and elect to be tried by the court, *when there is a positive legislative enactment giving the right so to do and conferring power on the court to try the accused*

*in such a case, there are numerous decisions by State courts upholding the validity of such proceeding.* (*Dailey* v. *The State*, 4 Ohio St., 57; *Dillingham* v. *The State*, 5 Ohio St., 280; *People* v. *Noll*, 20 California, 164; *State* v. *Worden*, 46 Connecticut, 349; *State* v. *Albee*, 61 N. H., 423, 428.)

**Thompson v. Utah, 170 U. S., 343.**

The court, speaking through Mr. Justice Harlan, said (p. 353):

> It is said that the accused did not object, until after the verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. *It is sufficient to say that it was not in the power of one accused of felony*, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the questions of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

A trial by jury at the time of the adoption of the Constitution could even *be denied* to one charged with a violation of municipal ordinances. The Government contends that in the case at bar the defendant was convicted for a violation of a law enacted by Congress under its power to make laws for the government of Alaska in the nature of municipal by-laws or regulations.

**City of Mankato v. Arnold, 36 Minn., 62.**

The defendant in this case was arrested and brought before the municipal court of the city of Mankato, upon a charge of violating the ordinances of that city by the sale of intoxicating liquor in a less quantity than 5 gallons. The defendant demanded a jury trial, which was refused. The case was thereupon tried by the court, and the defendant was found guilty, and appealed from the judgment. The court said:

> The provisions of the Constitution which relate to the subject are article I, section 4, which is intended to preserve and continue the right of trial by jury as already existing when the Constitution was adopted, and section 6, which guarantees the right of trial by jury in all "criminal prosecutions." As respects prosecutions for offenses against the municipal authority simply, the provisions of the act referred to violate neither of these sections. *Before the adoption of the Constitution, and generally in this country and in England, except where otherwise expressly ordained by legislative enactment or constitutional provisions, the prevalent practice and rule was to dispense with jury trials in municipal prosecutions for the violation of ordinances. Byers* v. *Com.*, 42 Pa. St., 89; 1 Dill. Mun. Corp. (3d ed.), sec. 428 (358); Proffatt on Trial by Jury, sec. 84.

And again (p. 65):

> *Prosecutions for offenses against municipal by-laws, which in cities, from the number and nature of such cases, must necessarily be summary to be effective, are on the same footing with prosecutions for*

*petty offenses, which in some jurisdictions are summarily tried, and a jury held not to be required, even though the penalty be a limited imprisonment.* (*People* w. *Justices*, etc., 74 N. Y., 406.) In respect to the matter last suggested, Mr. Dillon says (1 Mun. Corp.), No. 427 (357), that such penalty does not necessarily make the case one to which the right to a jury trial extends. The question depends rather upon the intrinsic nature of the offense.

*State* w. *West*, 42 Minn., 147.
*State* w. *Harris*, 50 Minn., 128.
*State* w. *Woodling*, 53 Minn., 142.

See also

*State* w. *Kaufman*, 51 Iowa, 578.
*State* w. *Dailey*, 12 Cush., 80.
*United States* v. *Taylor*, 11 Fed., 470.
*United States* v. *Shaw*, 59 Fed., 110.

**Defendant in fact confessed his guilt.**

The defendant in the case at bar, in addition to an express waiver of his right to a trial by jury, admitted in open court every material fact alleged in the complaint. There was, therefore, no issue of fact to be tried by a jury, the only question being one of law, as to whether the statute was constitutional. The court having decided this question of law adversely to the contention of the defendant, and the facts alleged in the complaint being admitted, nothing remained for the court to do except to adjudge the defendant guilty of the offense charged, and pass sentence.

Section 97 of the Code of Criminal Procedure of Alaska provides (30 Stat., p. 1295):

> That if the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; *but if he do not plead, judgment must be given against him.*

It will thus be observed that under the law the defendant had the opportunity to plead *not guilty* after his demurrer had been overruled, but he still persisted *in admitting the facts alleged in the complaint*, which was tantamount to a *confession of guilt.*

In the case of *Hallinger* v. *Davis* (*supra*) this court said (p. 318):

> *If a recorded confession of every material averment of an indictment puts the confessor upon the country, the institution of jury trial and the legal effect and nature of a plea of guilty have been very imperfectly understood, not only by the authors of the Constitution and their successors down to the present time, but also by all the generations of men who have lived under the common law.* It is only necessary, in order to determine whether the legislature transcended its power in the act, to inquire whether it is prohibited by the Constitution. The right of the accused to a trial was not affected, and we can, therefore, have no doubt that the proceeding to ascertain the degree of the crime where, in an indictment for murder, the defendant enters a plea of guilty, is constitutional and valid. Statutes of like or similar import have been enacted in many of

1846



the States, and have never been held unconstitutional. On the other hand, they have been repeatedly and uniformly held to be constitutional.

See *State* v. *Almy* (67 N. H., 274), and cases cited.

So in the case at bar, the statute above quoted in effect provides that if the defendant, after having interposed a demurrer which is overruled, *elects to stand upon his admission of the facts charged in the complaint, that such action on his part shall constitute and be equivalent to a "plea of guilty" which will authorize the court to impose a sentence* which will be as valid and effectual as though the defendant entered a *formal plea of guilty.*

IN CONCLUSION.

It will be observed that in our discussion of the constitutional question here presented we have freely disclaimed any intention of attempting to sustain the law here under consideration as being authorized under the general taxing clause of the Constitution. If, however, the Territory of Alaska has never been incorporated into the United States so as to become an integral part thereof, the power of Congress to tax in that Territory for general purposes under the general taxing clause of the Constitution, unrestricted by the limitations contained in that instrument as to apportionment and uniformity, might well be urged upon the consideration of this court upon the theory that the general taxing power of Congress reaches every place subject to its jurisdiction, while the limitations as to apportionment

and uniformity are applicable as a restriction upon such power only within such territory as has been either expressly or impliedly incorporated into the United States. And while it must be conceded that four of the concurring justices in *Downes* v. *Bidwell* (*supra*) expressed it as their opinion that Alaska has been incorporated into and has become a part of the United States, it will, I think, be conceded that the precise political status of Alaska was a question the determination of which was not necessarily involved in the decision of that case. Nor is that question necessarily presented for determination in the case at bar, and therefore may well be left for consideration in some case necessarily involving its examination.

We have taken the liberty of referring to this point thus briefly, in conclusion, in order that we may not be understood as conceding that Congress may not tax in the Territory of Alaska for general purposes unrestricted by those constitutional limitations as to apportionment and uniformity which, in our judgment, would be inapplicable to that Territory if it has never been incorporated into and become an integral part of the United States.

Respectfully submitted.

MILTON D. PURDY,
*Assistant Attorney-General.*

# APPENDIX A.

## VARIOUS PROVISIONS OF THE ALASKA CODE OF CRIMINAL PROCEDURE APPLICABLE TO THE CASE AT BAR.

### 1. Sections of the Criminal Code referring to license fees.

Section 460, of the act of March 3, 1899, as amended by the act of June 6, 1900, (31 Stat. 330):

SEC. 29. An act entitled "An act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for the district," approved March third, eighteen hundred and ninety-nine, be, and is, amended, by adding to section three hundred and sixty-three thereof the following: "*Provided*, Section fifteen of an act entitled 'An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, eighteen hundred and seventy-nine, and for other purposes,' approved June eighteenth, eighteen hundred and seventy-eight, shall not be construed to apply to the district of Alaska:" *Provided further*, That section four hundred and sixty, chapter forty-four, title two, of said first-mentioned act, be amended to read as follows:

"SEC. 460. That any person or persons, corporation, or company prosecuting or attempting to prosecute any of the following lines of business within the district of Alaska shall first apply for and obtain license so to do from a district court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit:

"Abstract offices, fifty dollars per annum.

"Banks, two hundred and fifty dollars per annum.

"Boarding houses having accommodations for ten or more guests, fifteen dollars per annum.

"Brokers (money, bill, note, and stock), one hundred dollars per annum.

"Billiard rooms, fifteen dollars per table per annum.

"Bowling alleys, fifteen dollars per annum.

"Breweries, five hundred dollars per annum.

"Bottling works, two hundred dollars per annum.

"Cigar manufacturers, twenty-five dollars per annum.

"Cigar stores or stands, fifteen dollars per annum.

"Drug stores, fifty dollars per annum.

"Public docks, wharves, and warehouses, ten cents per ton on freight handled or stored.

"Electric-light plants, furnishing light or power for sale, three hundred dollars per annum.

"Fisheries: Salmon canneries, four cents per case; salmon salteries, ten cents per barrel; fish-oil works, ten cents per barrel; fertilizer works, twenty cents per ton.

"Freight and passenger transportation lines, propelled by mechanical power registered in the district of Alaska, or not paying license or tax elsewhere, and river and lake steamers, as well as transportation lines doing business wholly within the district of Alaska, one dollar per ton per annum on net tonnage, custom-house measurement, of each vessel.

"Gas plants, for heat or light, for sale, three hundred dollars per annum.

"Hotels, fifty dollars per annum.

"Halls, public, ten dollars per annum.

"Insurance agents and brokers, twenty-five dollars per annum.

"Jewelers, twenty-five dollars per annum.

"Mines: Quartz mills, three dollars per stamp per year.

"Mercantile establishments: Doing a business of one hundred thousand dollars per annum, five hundred dollars per annum; doing a business of seventy-five thousand dollars per annum, three hundred and seventy-five dollars per annum; doing a business of

1847



fifty thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of twenty-five thousand dollars per annum, one hundred and twenty-five dollars per annum; doing a business of ten thousand dollars per annum, fifty dollars per annum; doing a business of under ten thousand dollars per annum, twenty-five dollars per annum; doing a business of under four thousand dollars per annum, ten dollars per annum.

"Meat markets, fifteen dollars per annum.

"Manufactories not enumerated herein, same classification and license charges as mercantile establishments.

"Physicians, itinerant, fifty dollars per annum.

"Planing mills, fifty dollars per annum when not part of a sawmill.

"Pawnbrokers, three hundred dollars per annum.

"Peddlers, twenty-five dollars per annum.

"Patent-medicine venders (not regular druggists), fifty dollars per annum.

"Railroads, one hundred dollars per mile per annum on each mile operated.

"Restaurants, fifteen dollars per annum.

"Real estate dealers and brokers, fifty dollars per annum.

"Ships and shipping: Ocean and coastwise vessels doing local business for hire plying in Alaskan waters, registered in Alaska or not paying license or tax elsewhere, one dollar per ton per annum on net tonnage, custom-house measurement, of each vessel.

"Sawmills, ten cents per thousand feet on the lumber sawed.

"Steam ferries, one hundred dollars per year.

"Toll road or trail, two hundred dollars per annum.

"Tobacconists, fifteen dollars per annum.

"Tramways, ten dollars for each mile or fraction thereof per annum.

*"Transfer companies, fifty dollars per annum.*

"Taxidermists, ten dollars per annum.

"Theaters, one hundred dollars per annum.

"Waterworks, furnishing water for sale, fifty dollars per annum."

SEC. 461. (30 Stat. 1337): That any person, corporation, or company doing or attempting to do business in violation of the provisions of the foregoing section, or without having first paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, for the first offense, in a sum equal to the license required for the business, trade, or occupation; and for the second offense, a fine equal to double the amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months: *Provided*, That each day business is done or attempted to be done in violation of the preceding section shall constitute a separate and distinct offense: *And provided further*, That any person, firm, or corporation hitherto engaged in any business within the said district of Alaska mentioned in the last preceding section, or that may engage in such business at any time prior to the first day of July, anno Domini eighteen hundred and ninety-nine, shall not be deemed to have violated the provisions of this section and the last preceding section if, in the opinion of the court or judge thereof, such person, firm, or corporation shall not have had reasonable time and opportunity to apply for license as hereinbefore required.

**2. Jurisdiction of United States commissioners and justices of the peace in the trial of misdemeanors.**

SEC. 408 (30 Stat., p. 1330). That in addition to the commissioners appointed by the President of the United States in pursuance of acts of Congress now in force, or that may be hereafter enacted, the judge of the district court of said district may appoint commissioners, who shall reside at such places as he may designate in the order of appointment, and who shall perform the duties and exercise the powers conferred upon justices of the peace by this act.

SEC. 410. That a justice's court has jurisdiction of the following crimes:

First. Larceny, where the punishment therefor may be imprisonment in the county jail or by fine.

Second. Assault, or assault and battery, not charged to have been committed with intent to commit a felony, or in the course of a riot, or with a dangerous weapon, or upon a public officer in the discharge of his duties.

Third. Of any misdemeanor punishable by imprisonment in the county jail, or by fine, or by both.

SEC. 412. That in a justice's court a criminal action is commenced by the filing of the complaint therein, verified by the oath of the person commencing the action, who is thereafter known as the private prosecutor; and no judgment of conviction or acquittal can be given in a criminal action in justice's court unless the person injured appear or be subpœnaed to attend the trial as a witness.

SEC. 413. That the complaint is to be deemed an indictment within the meaning of the provisions of chapter seven, title two, of this act, prescribing what is sufficient to be stated in such pleading and the form of stating it.

**3. A jury trial may be waived by the accused when tried before a United States commissioner.**

SEC. 417 (30 Stat., p. 1331). That the defendant may plead the same plea as upon an indictment. His plea must be oral and entered in the docket. If the defendant refuse to plead, the justice must enter the fact, together with the plea of not guilty, on his behalf.

SEC. 418. That upon a plea other than a plea of guilty, *if the defendant do not then demand a trial by jury the justice must proceed to try the issue.*

**4. Pleadings allowed upon the trial of criminal cases.**

SEC. 88 (30 Stat., p. 1294). That the only pleading on the part of the defendant is either a demurrer or plea.

SEC. 91. That the demurrer must be in writing, signed either by the defendant or his attorney, and filed. It must distinctly specify the ground of objection to the indictment, or it may be disregarded.

SEC. 97. That if the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; *but if he do not plead, judgment must be given against him.*

**5. Issues of law and fact, how tried.**

SEC. 108 (30 Stat., p. 1296). That an issue of fact arises—

First. Upon a plea of not guilty; or,

Second. Upon a plea of former conviction or acquittal of the same crime.

SEC. 109. That an issue of law arises upon a demurrer to the indictment.

SEC. 110. That an issue of law must be tried by the court, and an issue of fact by jury, of the political division in which the action is triable.

SEC. 111. That if the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but if it be for a felony, he must be present in person.

**6. Provisions relative to appeals in criminal cases from justice courts to the United States district court for the district of Alaska.**

SEC. 441 (30 Stat., p. 1334). That an appeal may be taken from a judgment of conviction given in a justice's court, in a criminal action, to the district court, except when the same is given on a plea of guilty, as prescribed in this chapter, and not otherwise.

SEC. 449. That from the filing of the transcript with the clerk of the district court the appeal is perfected, and the action is to be deemed pending therein and for trial upon the issue tried in the justice's court. The appellate court has the same authority to allow an amendment of the pleadings, on an appeal in a criminal action, that it has on an appeal in a civil action.

**7. The mode of trial in appellate court. (On a demurrer same as in case of an indictment.)**

SEC. 97 (30 Stat., p. 1295). That if the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him.

**8. Writs of error to the United States Supreme Court.**

SEC. 202 (30 Stat., p. 1307). That appeals and writs of error in criminal actions may be taken and prosecuted from the decisions and judgments of the district court for the district of Alaska to the Supreme Court of the United States, or to the circuit court of appeals for the ninth circuit, in the same manner and under the same regulations as from the circuit and district courts of the United States, under the acts of Congress now in force or that may be hereafter enacted.

# APPENDIX B.

## ALASKA BEFORE THE TREATY.

*Kinkead* v. *United States*, 150 U. S., 483. Mr. Justice Brown said in this case, respecting the government of Alaska (p. 490):

> It appeared that the Territory of Alaska had, prior to its cession to the United States, been occupied by a Russian corporation known as the Russian-American Company, a corporation largely engaged in fur trading. This company had the privilege of making use of the public lands and erecting buildings thereon. It had no right, however, of becoming the owner of such lands, but did have the privilege of conveying parcels of it in fee simple to its employees. Pursuant to this privilege, it had made conveyance of certain of these lands to its employees, upon which had been constructed the dwellings erected by the company and occupied by such employees, their widows or children. Apparently, however, it had no right to acquire for itself any title to the soil, and enjoyed nothing more than the use of the land upon which its buildings were situated, the dominion or right of property therein remaining in the Russian Government. The company appears to have possessed not only the ordinary powers of a trading corporation, but certain governmental powers, which it exercised arbitrarily, if not despotically, over the entire territory. It had a monopoly of the trade of the territory, and appears to have been in fact a provincial government of the Russian Empire.

By the first article His Majesty the Emperor of all the Russias agrees to cede to the United States all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within certain geographical limits set forth in the article.

By the second article there are included in this cession of territory and dominion the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property.

Property belonging to the Greek Oriental Church was excluded from the cession. Government archives relative to the territory and dominion are to be left in the possession of the United States, but another copy is to be furnished to the Russian Government.

The third article provided:

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

By the fourth article provisions are made for the formal delivery of the territory; but it is provided that the cession, with the right to immediate possession, is

nevertheless to be deemed complete and absolute on the exchange of ratifications.

Article V provides for the delivery of the fortifications or military posts and for the withdrawal of Russian troops.

By the sixth article the United States agrees to pay, within ten months after the exchange of the ratifications, $7,200,000 in gold.

> The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.

## VARIOUS ACTS OF CONGRESS FOR THE GOVERNMENT OF ALASKA SUBSEQUENT TO THE TREATY AND PRIOR TO THE CRIMINAL CODE OF MARCH 3, 1899.

### Act of July 27, 1868 (15 Stat. L., 240).

By the act of July 27, 1868 (15 Stat. L., 240), the laws of the United States relating to customs, commerce, and navigation, so far as applicable, were extended to and over Alaska (sec. 1). All of this territory was constituted a customs collection district, with a port of entry to be established at or near Sitka (2). The Secretary of the Treasury was authorized to make regulations for the naturalization of vessels owned by residents of Alaska at the time of its cession (3). The President was given power to regulate or prohibit the importation and use of fireams, ammunition, and distilled spirits. (Sec. 4.)

The coasting trade between Alaska "and any other portion of the United States" was to be regulated according to the laws of the United States (5). The killing of fur-bearing animals was prohibited (6). Violations of law were to be prosecuted in the United States courts in Oregon, California, or Washington (7). The Secretary of the Treasury may prescribe regulations for carrying into effect this act, except the provisions intrusted to the President alone.

**Act of May 17, 1884 (23 St., 24).**

The act of May 17, 1884 (23 St., 24), constituted Alaska a civil and judicial district, with the seat of government at Sitka (1). A governor was provided, charged with the interest of the United States Government arising within the district, with authority to see that the laws are enforced. Power was given him to grant reprieves pending the decision of the President (2). A district court was established, with civil and criminal jurisdiction of district courts of the United States, and such other jurisdiction as may be established by law. Two terms of the court each year, one at Sitka and the other at Wrangel, were provided. The judge was given authority "to make allowances for necessary expenses of his court" (3).

> SEC. 4. That a clerk shall be appointed for said court, *who shall be ex officio secretary and treasurer of said district*, a district attorney, and a marshal, all of whom shall during their terms of office reside therein. The clerk shall record and preserve copies of all the laws, proceedings, and official acts applicable to said district. *He shall also receive all moneys collected from fines, forfeitures, or in any other manner except from violations of the custom laws, and shall apply the same to the incidental expenses of the said district*

*court* and the allowances thereof, as directed by the judge of said court, and shall account for the same in detail, and for any balances on account thereof, quarterly, to and under the direction of the Secretary of the Treasury.

By section 5 four commissioners were provided, with the civil and criminal jurisdiction of justices of the peace in Oregon. They were also given jurisdiction in testamentary and probate matters. They were also given power to grant writs of habeas corpus, returnable before the district judge. They had powers of notaries public. Fines and forfeitures collected by them were to be paid over to the clerk. Four deputy marshals were provided for, with authority of United States marshals and powers and duties of constables under the laws of Oregon (6). The general laws of Oregon were made the laws of the district, so far as applicable. Writs of error in criminal cases were to issue to the United States circuit court of Oregon. Final judgments were reviewable by the Supreme Court of the United States (7).

Alaska was created a land district, with certain special provisions (8). The salaries and fees of various officers were established and it was provided that the laws of the United States not locally inapplicable should be extended to the district, but there should be no legislative assembly nor any Delegate (9.)

**Act May 14, 1898 (30 Stat., 409).**

The act of May 14, 1898 (30 Stat., 409), provides for the extension of the homestead laws to Alaska, and for the granting of right of way through the lands of the United States in that district to any railroad company, upon certain conditions. Rates and fares in Alaska are to be printed and posted as required by the

interstate commerce act, and are subject to revision and modification by the Secretary of the Interior (sec. 2). The act also contains provisions for the grant of rights of way for wagon roads and tramways (sec. 6). Provisions are made for the purchase of Government land by residents upon certain terms (sec. 10). Also for the sale of timber (sec. 11). The privilege of entering goods in bond, and of withdrawing them for exportation to Canada, is granted to the government of Canada and its citizens.

# APPENDIX C.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
*Washington, November 8, 1901.*

Hon. JAMES M. BECK,
*Assistant Attorney-General.*

SIR: In reply to your request of the 31st ultimo, relative to the appropriations for Alaska and the disposition of the Government's revenues from the Territory, I submit the following statement:

| Appropriations. | 1900. | 1901. |
|---|---|---|
| Salaries of governor, etc | $31,000.00 | $70,035.72 |
| Contingent expenses of Territory | 2,000.00 | 2,000.00 |
| Salaries of surveyor-general, etc | 3,800.00 | 10,300.00 |
| Contingent expenses, office of surveyor-general | 1,000.00 | 1,500.00 |
| Traveling expenses of Territory | 2,852.00 | 3,000.00 |
| Rent, office of marshal | 10,000.00 | 14,500.00 |
| Education of children | 30,000.00 | 30,000.00 |
| Education of Indians | 5,000.00 | ..... |
| Reindeer for Alaska | 25,000.00 | 26,133.53 |
| Supplies for native inhabitants | 19,500.00 | 19,500.00 |
| Refuge station at Point Barrow | 106.67 | ..... |
| Salaries of agents at seal fisheries | 12,950.00 | 12,950.00 |
| Protection of salmon fisheries | 7,000.00 | 7,000.00 |
| Expenses of inspectors of pelagic seal skins | ..... | 110.00 |
| Maps of Alaska | 18.50 | ..... |
| Care and custody of insane | ..... | 356.21 |
| Repairs and expenses of steamer *Thetis* | 70,000.00 | ..... |
| Expenses of revenue vessels in Alaskan waters | 132,800.00 | 188,500.00 |
| Customs Service [a] | 52,367.79 | 58,245.89 |
| Internal-Revenue Service [a] | 3,850.00 | 3,650.00 |
| Light-House Service | ..... | 100,000.00 |
| Expenses of United States courts [a] | 55,700.00 | 339,500.00 |
| Salaries and commissions, land offices [a] | 3,000.00 | 5,200.00 |
| Indian schools | 7,000.00 | 7,000.00 |
| Total | 474,944.96 | 899,481.35 |

[a] Estimated.

In the foregoing statement the "estimated" amounts given are the approximate expenditures from general appropriations for the Alaskan service, as far as it is possible to separate them with the data on hand.

The item of "Expenses of United States courts" for 1901 includes receipts by judicial officers which are disbursed directly by them under the provisions of the act of June 6, 1900, section 7 (31 Stat., 324), without being covered into the Treasury, and which do not appear in the following statement of receipts.

| Receipts. | 1900. | 1901. |
|---|---|---|
| From customs | $57,623.62 | $86,593.15 |
| From internal revenue | 13,601.96 | 19,725.02 |
| From sales of public lands | 2,376.32 | 1,889.66 |
| From tax on sealskins | 224,476.47 | 229,755.75 |
| From rent of islands for propagating foxes | 1,200.00 | 2,900.00 |
| From license fees and fines | 157,234.94 | 147,255.33 |
| Total | 456,513.31 | 488,118.91 |

For the fiscal year 1900 the license fees were deposited in the Treasury in one sum without subdivision, no separate data thereon being furnished. For the fiscal year 1901 the fees and costs, fines and penalties, and a portion of the license fees were deposited in one sum, amounting to $63,167.43; and the remainder of the license fees, amounting to $84,087.90, were separately covered into the Treasury. Correspondence with the clerk of the United States district court in Alaska established the fact that the information necessary to subdivide the first of the foregoing items for 1901 could not be obtained at that time.

For the fiscal year 1902 the receipts from licenses, fees and costs, fines, penalties, etc., are being covered into the Treasury under instructions of the honorable

Attorney-General (see Supplemental Instructions to Clerks of the District Court of Alaska, May 1, 1901) under separate heads, as follows:

1. "*License fees collected in incorporated towns*," being one-half of the total collections on this account, covered into the Treasury as provided in the act of March 3, 1899, 30 Stat., page 1336, the remaining 50 per cent of these collections being paid over to the treasurer of the corporation for school purposes, under the provisions of the acts of June 6, 1900, 31 Stat., page 521, section 203, and March 3, 1901, 31 Stat., page 1438.

2. "*License fees collected outside of incorporated towns*," being the full amount collected on this account, 50 per cent of which is appropriated and becomes available for school purposes outside of corporate limits, under the direction of the Secretary of the Interior, as provided in the act of March 3, 1901, 31 Stat., page 1438.

3. "*Funds other than license fees available for court expenses*," being the balance of the receipts of this class after the payment therefrom (before deposit is made) of certain court expenses authorized by the judge of the district court, covered into the Treasury under section 7 of the act of June 16, 1900, 31 Stat., page 324.

The receipts under these separate heads for the current fiscal year to date are as follows:

| | |
|---|---|
| 1. License fees collected in incorporated towns | $9,463.30 |
| 2. License fees collected outside of incorporated towns | 20,822.16 |
| 3. Funds other than license fees available for court expenses | 3,507.10 |

Respectfully,

M. E. AILES,
*Assistant Secretary.*

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
*Washington, November 29, 1902.*

Hon. J. K. RICHARDS,
*Solicitor-General, Department of Justice,*
*Washington, D. C.*

SIR: Referring to your communication of the 24th instant relative to the statement of appropriations for Alaska and of the revenues collected in the Territory for the years 1900 and 1901, furnished to the Department of Justice by Department letter of November 8, 1901, and in reply to your request for an additional statement bringing the information down to date, I submit the following:

| Appropriations. | 1902. | 1903. |
|---|---|---|
| Salaries of governor, etc | $52,625.00 | $51,500.00 |
| Contingent expenses of Territory | 2,000.00 | 2,000.00 |
| Salaries of surveyor-general, etc | 8,000.00 | 8,000.00 |
| Contingent expenses, office of surveyor-general | 1,500.00 | 1,500.00 |
| Traveling expenses of Territory | 5,000.00 | 5,000.00 |
| Rent, etc., office of marshal | 10,000.00 | 10,096.50 |
| Reindeer for Alaska | 25,000.00 | 25,000.00 |
| Supplies for native inhabitants | 19,500.00 | 15,000.00 |
| Salaries of agents at seal fisheries | 12,950.00 | 12,950.00 |
| Protection of salmon fisheries | 7,000.00 | 7,000.00 |
| Expenses, inspectors of pelagic seal skins | 100.00 | 100.00 |
| Care and custody of insane | 3,918.76 | 926.26 |
| Light-House Service | 200,000.00 | 126,013.00 |
| Internal-Revenue Service | 2,210.00 | 2,700.00 |
| Indian schools | 7,000.00 | 7,000.00 |
| Transportation of destitute miners and citizens | 920.00 | 8,550.00 |
| Schools outside of incorporated towns | 35,882.41 | [a] 50,000.00 |
| Salaries and commissions, land offices | 8,617.65 | [a] 9,000.00 |
| Expenses of revenue vessels in Alaskan waters | 120,000.00 | [a] 150,000.00 |
| Customs Service | [a] 66,292.43 | [a] 65,000.00 |
| Expenses of United States courts | [a] 378,000.00 | [a] 400,000.00 |
| Total | 966,516.25 | 957,335.76 |

[a] Estimated.

In the foregoing statement the "estimated" amounts given are the approximate expenditures from general appropriations for the Alaskan service, as far as it is possible to separate them with the data on hand.

The items of "Expenses of United States courts" include receipts by judicial officers which were disbursed directly by them under the provisions of the act of June 6, 1900 (31 Stat., p. 324, sec. 7), without being covered into the Treasury, and do not appear in the receipts as stated below.

The expense of revenue vessels in Alaskan waters is estimated by the revenue-marine division on the basis of a five months' cruise in 1902 and six months in 1903.

| Receipts. | 1902. | First quarter 1903. |
|---|---|---|
| From customs | $62,682.47 | $29,510.53 |
| From internal revenues | 23,281.17 | 85.66 |
| From sales of public lands | 5,819.96 | 190.00 |
| From tax on sealskins | 231,821.20 | (a) |
| From rent of islands for propagating foxes | | 100.00 |
| License fees (balance of 1901 receipts) | 1,477.49 | |
| License fees collected in incorporated towns | 22,463.30 | 26,985.00 |
| License fees collected outside of incorporated towns | 71,864.22 | 24,510.26 |
| Funds other than license fees available for court expenses | 8,523.39 | 7,814.89 |
| Funds not available for court expenses | 3,173.53 | |
| Total | 431,106.73 | 89,196.34 |

[a] The revenues from this source are usually received and covered into the Treasury during the third quarter of the fiscal year.

The inclosure to your letter is herewith returned.

Respectfully,

M. E. AILES,
*Assistant Secretary.*

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TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
*Washington, March 10, 1904.*

Hon. M. D. PURDY,
*Assistant Attorney-General.*

SIR: In reply to your communication of the 9th instant I transmit herewith the following statement of

appropriations for Alaska for the fiscal year 1904 and of the revenues collected in the Territory for the fiscal year 1903 and the first half of the fiscal year 1904:

| Appropriations. | 1904. |
|---|---|
| Salaries of governor, etc | $51,500.00 |
| Contingent expenses of Territory | 2,000.00 |
| Salaries of surveyor-general, etc | 8,000.00 |
| Contingent expenses, office of surveyor-general | 1,500.00 |
| Traveling expenses of Territory | 5,000.00 |
| Incidental expenses of Territory | 5,000.00 |
| Reindeer for Alaska | 25,000.00 |
| Supplies for native inhabitants | 15,000.00 |
| Salaries, agents at seal fisheries | 12,950.00 |
| Protection of salmon fisheries | 7,000.00 |
| Expenses, inspectors of pelagic-seal skins | 100.00 |
| Light-house service | 200,000.00 |
| Internal-revenue service | 5,450.00 |
| Indian schools | 7,000.00 |
| Transportation of destitute citizens | 5,140.10 |
| Court-house and jail at Juneau | 15,000.00 |
| Site for military post at Skagway | 500.00 |
| Military telegraph and cable lines | 2,500.00 |
| Alaska exhibit, St. Louis Exposition | 50,000.00 |
| Care and custody of the insane | [a] 8,000.00 |
| Salaries and commissions, land offices | [a] 9,000.00 |
| Schools outside of incorporated towns | [a] 50,000.00 |
| Expenses, revenue vessels in Alaskan waters | [a] 160,000.00 |
| Customs service | [a] 65,000.00 |
| Expenses of the United States courts | [a] 500,000.00 |
| Total | 1,210,640.10 |

[a] Estimated.

In the foregoing statement the "estimated" amounts given are the approximate expenditures from general appropriations for the Alaskan service, as far as it is possible to separate them with the data on hand.

The items of "Expenses of United States courts" include receipts by judicial officers which were disbursed directly by them under the provisions of the act of June 6, 1900 (31 Stat., p. 324, sec. 7), without being covered into the Treasury, and do not appear in the receipts as stated below.

| Receipts. | 1903. | Six months of 1904. |
|---|---|---|
| Customs | $70,938.66 | $22,853.04 |
| Internal revenue | 17,494.58 | [a] 9,000.00 |
| Sales of public lands | 2,286.56 | 2,626.46 |
| Tax on sealskins | 286,133.40 | ..... |
| Rent of islands for propagating foxes | 100.00 | 200.00 |
| License fees collected in incorporated towns | 26,985.00 | 23,931.78 |
| License fees collected outside incorporated towns | 46,413.98 | 40,921.81 |
| Funds other than license fees available for court expenses | 7,814.89 | 2,556.79 |
| Funds other than license fees not available for court expenses | 2,311.35 | 12,287.47 |
| Customs fees, fines, etc | 4,547.44 | 3,204.15 |
| Rent of Government buildings, etc | 2,451.04 | 1,753.45 |
| Registers' and receivers' fees | 505.04 | 255.67 |
| Miscellaneous | 35.10 | 39.36 |
| Total | 468,017.04 | 119,629.98 |

[a] Estimated.

The tax on sealskins is usually received and covered into the Treasury during the third quarter of the fiscal year.

The brief inclosed in your letter is herewith returned as requested.

Respectfully, C. H. KEEP,
*Assistant Secretary.*

O

# (18,905.)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1903.

## No. 266.

C. E WYNN-JOHNSON, PLAINTIFF IN ERROR,

*vs.*

JAMES M. SHOUP, UNITED STATES MARSHAL FOR THE DISTRICT OF ALASKA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Petition for writ of *habeas corpus* | 2 | 1 |
| Order for writ of *habeas corpus* | 4 | 2 |
| Bail bond | 5 | 3 |
| Writ of *habeas corpus* | 7 | 4 |
| Marshal's return | 8 | 5 |
| Certified copy of bail bond | 8 | 5 |
| Surrender by sureties | 10 | 6 |
| Order admitting to bail | 11 | 7 |
| Opinion | 13 | 8 |
| Order denying petition and remanding petitioner | 19 | 12 |
| Order admitting to bail | 20 | 12 |
| Notice of appeal | 21 | 13 |
| Bail bond | 22 | 13 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 22, 1904.

| | Original. | Print |
|---|---|---|
| Certified copy of order remanding petitioner | 24 | 15 |
| Marshal's certificate | 25 | 15 |
| Bill of exceptions | 26 | 16 |
| Order denying petition, &c. | 26 | 16 |
| Assignment of errors | 28 | 17 |
| Petition for writ of error | 30 | 18 |
| Order allowing writ of error | 31 | 19 |
| Bond on writ of error | 32 | 19 |
| Clerk's certificate | 34 | 21 |
| Writ of error | 35 | 21 |
| Citation and service | 38 | 22 |

1 UNITED STATES OF AMERICA, } ss:
*District of Alaska, Division No. 1,* }

Pleas and proceedings began and held in the district court of the United States for the district of Alaska, at the October term, 1901.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus.* No. 138.

On October 29th, 1901, the plaintiff filed his petetion in said cause, which is in words and figures following, to-wit:

2 In the United States District Court for the District of Alaska, Div. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus.*

To the Honorable Melville C. Brown, judge of the United States district court for the district of Alaska, div. No. 1:

The petition of C. E. Wynn-Johnson respectfully shows:

That the said C. E. Wynn-Johnson is unlawfully imprisoned, detained, confined and restrained of his liberty by James M. Shoup, United States marshal for the district of Alaska, division No. 1.

That the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof consists in this:

That the said C. E. Wynn-Johnson, together with a certain Moore's Wharf Company, of Skagway, (of which said Moore's Wharf Company your petitioner then was and still is the general manager) was wrongfully and unlawfully indicted by the grand jury, then sitting at said Skagway, within said division No. 1. within and for the said district of Alaska, for an alleged violation of section 461, of the Alaska Criminal Code, to wit: for the crime of doing and carrying on unlawfully, wilfully and knowingly, the business of a public wharf, at said Skagway, Alaska, without first applying for and obtaining the license so to do from the said United States district court for Alaska, division No. 1.

That pursuant to said indictment and charge, your petitioner was arrested by said James M. Shoup, United States marshal aforesaid, upon and by virtue of a warrant issued out of and under the seal of this court, and by reason of such said warrant your petitioner is now restrained and imprisoned, as above mentioned.

3 That the said section 461 of said Alaska Criminal Code, for the alleged and charged violation of which section, your peti-

tioner is unlawfully imprisoned, detained, confined and restrained of his liberty, as aforesaid, is unconstitutional and inoperative, unreasonable and of no effect, so as to compel a compliance with the terms of said section by your petitioner.

Wherefore, your petitioner prays that a writ of *habeas corpus* may be granted, directed to the said James M. Shoup, United States marshal for the district of Alaska, division No. 1, commanding him to have the body of the said C. E. Wynn-Johnson before your honor, at a time and place therein, to be specified, to do and receive what shall then and there be considered by your honor concerning him, together with a time and cause of his detention, and said writ; and that he may be restored to his liberty.

Dated, this 29th day of October, 1901.

C. E. WYNN-JOHNSON.

UNITED STATES OF AMERICA, *District of Alaska,* } *ss:*

C. E. Wynn-Johnson being first duly sworn says: I am the petitioner above named, that I have read the foregoing petition and know the contents thereof, that the same is true, as I verily believe.

C. E. WYNN-JOHNSON.

Subscribed and sworn to before me this 29th day of October, 1901.

[SEAL.]

F. D. KELSEY,
*Notary Public for Alaska.*

(Endorsed:) No. 138 In U. S. dist. court for Alaska; div. No. 1 In the matter of the application of C. E. Wynn-Johnson for a writ of *habeas corpus.* Petition. Filed Oct. 29 1901 W. J. Hills, clerk, by —— —— deputy. J. G. Heid, att'y for petitioner.

4 In the United States District Court for the District of Alaska, Div. No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus.*

On reading and filing the petition of C. E. Wynn-Johnson duly signed and verified by him, whereby it is alleged that he is illegally imprisoned and restrained of his liberty by James M. Shoup, U. S. marshal for the district of Alaska, division No. 1. at Skagway in said district in said division, and stating wherein the illegality consists, from which it appears to me that a writ of *habeas corpus* ought to issue:

It is ordered that a writ of *habeas corpus* issue out of and under the seal of the United States district court, for the district of Alaska, division No. 1. directed to the said James M. Shoup U. S. marshal as

aforesaid, commanding him to have the body of the said C. E. Wynn-Johnson before me, in the court room of the said court, at Skagway in said district, on the 29th day of October 1901, at 3½ o'clock p. m. of that day, to do and receive what shall then and there be considered concerning the said C. E. Wynn-Johnson, together with the time and cause of his detention, and that he have then and there the said writ.

Dated on the 29th day of October, 1901.

By the court:

M. C. BROWN, *Judge.*

(Endorsed:) No. 138. In U. S. district court, dist. of Alaska, div. No. 1. In the matter of the application of C. E. Wynn-Johnson for a writ of *habeas corpus*. Order for writ. Filed Oct. 29 1901 W. J. Hills, clerk, by —— —— deputy.

5 In the United States District Court for the District of Alaska, Div. No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus*.

An indictment having been found on the 10th day of December 1900, in the district court, for the district of Alaska, division No. 1, charging the above named C. E. Wynn-Johnson with the crime of doing and carrying on unlawfully, wilfully and knowingly the business of a public wharf at Skagway, Alaska, without first applying, paying for and obtaining the license so to do from the United States district court for the district of Alaska, division No. 1. And upon the granting of a writ of *habeas corpus* in his behalf, and having been duly admitted to bail in the sum of twenty five hundred dollars:

We, Lee Guthrie, of the town of Skagway, Alaska, by occupation merchant and J. Bernard Moore, of said town of Skagway, Alaska, by occupation warehouseman, hereby undertake that the above named C. E. Wynn-Johnson, will appear and answer the charge above mentioned, in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted will appear for judgment and render himself in execution thereof; or if he fails to perform either of these conditions, that we will pay to the United States of America the sum of twenty five hundred (2500) dollars.

LEE GUTHRIE.
J. BERNARD MOORE.

6 UNITED STATES OF AMERICA, *District of Alaska,* } *ss:*

Lee Guthrie and J. Bernard Moore whose names are subscribed as sureties to the above undertaking, being severally sworn, each

for himself says, that he is a resident and a householder within the district of Alaska, and *the* he is worth the sum specified in the said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

LEE GUTHRIE.
J. BERNARD MOORE.

Subscribed and sworn to before me this 29th day of October, 1901.
[SEAL.] F. D. KELSEY,
*Notary Public for Alaska.*

UNITED STATES OF AMERICA, } ss:
*Dist. of Alaska, Div. No.* 1, }

The above and foregoing bond & the sureties thereon are hereby approved by the court this 29th day of October, 1901.

M. C. BROWN, *Judge.*

(Endorsed:) No. 138 In U. S. dist. court for Alaska, div. No. 1. In the matter of the application of C. E. Wynn-Johnson, for a writ of *habeas corpus.* Undertaking. Filed Oct. 29 1901 W. J. Hills, clerk, by —— —— deputy.

7 In the United States District Court for the District of Alaska, Div. No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus.*

UNITED STATES OF AMERICA, } ss:
*District of Alaska,* }

James M. Shoup, U. S. M., Greeting:

We command you, that you have the body of C. E. Wynn-Johnson by you imprisoned and detained, as is said, together with the time and cause of such imprisonment and detention, by whatsoever name said C. E. Wynn Johnson shall be called or charged, before Melville C. Brown, judge of the United States court for the district of Alaska, division No, 1. at the court room of said court at Skagway, in said district of Alaska, on the 29th day of October 1901, at 3½ o'clock in the after-noon of that day, to do and receive what shall then and there be considered concerning the said C. E. Wynn-Johnson. And have you then and there this writ.

Witness, Hon. Melville C. Brown, judge of the said court, at the court room thereof, in the city of Skagway, district of Alaska, this 29th day of October, 1901.

Attest, my hand and the seal of the said court, the day and year last above written.

[SEAL.] W. J. HILLS, *Clerk.*

8 UNITED STATES OF AMERICA, } ss:
*Division No. —, District of Alaska,*

I James M. Shoup, U. S. marshal for the district of Alaska, division No. 1, hereby certify that I received the within writ at Skagway, Alaska, on October 29, 1901; that I have the person named therein, C. E. Wynn-Johnson, in my custody; that he is detained upon a charge of operating a public wharf at Skagway, Alaska, without having first obtained a license so to do, in violation of section four hundred and sixty, chapter forty-four, title two of the act entitled "An act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for the district," approved March 3, 1899, as amended by the act entitled "An act making further provision for a civil government for Alaska, and for other purposes," approved June 6, 1900; that he is detained by virtue of a certified copy of an undertaking executed on March 12, 1901, for his appearance upon said charge, and approved on said date, the sureties in said undertaking having this day surrendered the defendant to my custody in their exoneration; a copy of said certified copy of undertaking is annexed hereto and made a part of this return, and I now produce the original certified copy; in obedience to the command of the within writ I now produce the body of the said C. E. Wynn-Johnson before the Hon. M. C. Brown, judge of the U. S. district court, district of Alaska division No. 1.

Dated at Skagway, Alaska, October 29, 1901.

JAMES M. SHOUP,
*U. S. Marshal, District of Alaska, Division No. 1.*

An indictment having been found on the 10th day of December 1900, in the district court, for the district of Alaska, division No. 1. charging C. Wynn-Johnson, with the crime of operating a public wharf at Skagway, in the district of Alaska, without having first obtained a license so to do, and he having been duly admitted
9 to bail in the sum of two hundred dollars: We, E. J. Shaw of Skagway, Alaska, by occupation, cashier Moores wharf and H. B. Runnalls, by occupation physician & surgeon, of Skagway, Alaska, hereby undertake that the above named, C. Wynn-Johnson shall appear and answer the indictment above named in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court, and if convicted, shall appear for judgment, and render himself in execution thereof, or if he fail to perform either of those conditions, that he will pay to the United States, the sum of two hundred dollars.

Dated at Skagway, Alaska, this 12th day of March, 1901.

E. J. SHAW.
H. B. RUNNALLS.

UNITED STATES OF AMERICA, } ss:
*District of Alaska,* }

I, E. J. Shaw and H. B. Runnalls, being duly sworn on oath say each for himself, and not one for the other, that I am surety on the above and foregoing undertaking, and that I am a resident of the district of Alaska, and a householder therein; that I am neither an attorney or counsellor at law, clerk, marshal or other officer of any court in the district of Alaska, and that I am worth the sum of two hundred dollars over and above all my just debts and liabilities and exclusive of property exempt from execution.

E. J. SHAW.
H. B. RUNNALLS.

Subscribed and sworn to before me this 12th day of March, 1901.

C. A. SEHLBREDE,
*Commissioner & Ex-officio Justice of Peace.*

Taken and acknowledged before me this the day and year above written.

C. A. SEHLBREDE,
*Commissioner & Ex-officio Justice of Peace.*

10 The above and foregoing undertaking is approved by me this 12th day of March, A. D. 1901.

C. A. SEHLBREDE,
*Commissioner & Ex-officio Justice of Peace.*

UNITED STATES OF AMERICA, } ss:
*District of Alaska,* }

I, W. J. Hills, clerk of the United States district court, division No. 1, district of Alaska, do hereby certify that the foregoing is a full, true and correct copy of appearance bond, in the case of The United States *vs.* Moores Wharf Company & C. Wynn-Johnson, as fully as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Skagway, in said district, this 18 day of May, A. D. 1901.

[L. S.]

W. J. HILLS, *Clerk,*
By J. J. ROGERS, *Deputy.*

To James M. Shoup, Esq., U. S. marshal for Alaska:

We, the undersigned, sureties on the within undertaking, hereby surrender to you and place into your custody the within named C. E. Wynn-Johnson, and direct you to arrest the said C. E. Wynn-

Johnson, and keep him in your custody so as to release the undersigned sureties from all liability by reason of the within undertaking. Oct. 29, 1901.

H. B. RUNNALLS.
E. J. SHAW.

Office of U. S. marshal, district of Alaska, division No. 1.

OCTOBER 29, 1901.

I certify the above and foregoing to be a true copy.

JAMES M. SHOUP,
*U. S. Marshal, District of Alaska, Div. No.* 1.

11 I hereby acknowledge the surrender of the within named C. E. Wynn-Johnson into my custody this 29 day of Oct. 1901.

JAMES M. SHOUP,
*U. S. Marshal.*

(Endorsed:) No. 138 In U. S. district court for Alaska; div. No. 1. In the matter of the application of C. E. Wynn-Johnson for a writ of *habeas corpus*. Writ of *habeas corpus*. Returned & filed Oct. 29 1901 W. J. Hills, clerk, by —— —— deputy.

In the United States District Court for the District of Alaska, Division Number One.

*In re* the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus*.

And now on this 29th day of October, 1901, James M. Shoup, the United States marshal for division number one of the district of Alaska having returned into court, on the writ herein issued under the order of court the said C. E. Wynn-Johnson, as required
12 by the terms of said writ, and the United States district attorney and the attorney for the said Johnson not being prepared for the argument of the question now before the court, viz: whether the said C. E. Wynn-Johnson is unlawfully deprived of his liberty; and the court on motion of the said C. E. Wynn-Johnson by his attorney having postponed the said hearing until Friday, the 20th day of December, 1901 at Juneau, Alaska, and the said C. E. Wynn-Johnson being subject to the order of this court and desiring to give bail for his appearance before the court at that time,

It is ordered by the court, that James M. Shoup, United States marshal as aforesaid, be and he is hereby relieved from all further custody of the said C. E. Wynn-Johnson until the hearing of this matter, and that the said Johnson be and he is hereby permitted to

give bond to the United States for his appearance at the hearing aforesaid in the sum of two thousand five hundred dollars ($2500.00); whereupon, the bond of the said Johnson being now presented to the court for approval it is ordered that the same be and is hereby approved and accepted to secure the appearance of the said Johnson at the time and place aforesaid, and the said Johnson is discharged from custody until such hearing may be had.

Done in open court &c.

(Endorsed:) No. 138 *In re habeas corpus* C. E. Wynn-Johnson Filed Oct. 29 1901 W. J. Hills, clerk, by —— —— deputy.

13 In the United States District Court for the District of Alaska, Division No. 1.

*In re* C. E. WYNN-JOHNSON, Petitioner,
*v.*
JAMES M. SHOUP, as United States Marshal for the District of Alaska, Division No. 1.
} On Writ of *Habeas Corpus.*

At the Skagway October 1901 term of the court one C. E. Wynn-Johnson and the Moore's Wharf Company were jointly indicted under sections four hundred and sixty and four hundred and sixty-one of the crimes act of the dis rict of Alaska, for conducting a wharf &c. without first having obtained a license therefor as required by law. A bench warrant was issued upon said indictment and the said C. E. Wynn-Johnson taken into custody by the United States marshal, and brought into court. The said Johnson having failed and refused to give bail as required by law, he was retained in the custody of the United States marshal, and while so in custody he brought this proceeding in *habeas corpus* and prays to be discharged from custody.

No objection is made to the indictment, either in form or substance, or to the writ under which the United States marshal holds the said Johnson in custody; but counsel for said Johnson alleges that the statute requiring the payment of this license fee is unconstitutional and void, and that the said Johnson should be discharged from custody for that reason. The alleged unconstitutionality of the act of Congress is predicated upon the claim that such statute is in violation of that provision of the Constitu-
14 tion requiring uniformity in the laying and collection of taxes in the district of Alaska; in other words, that it is in violation of the first clause of sec. 8, art. 1, of the Constitution of the United States, which reads as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States."

The acts of Congress providing for customs duties and internal revenue have for years been extended to Alaska by express act of Congress, and all such collections of taxes and the laws under which made, were in force in Alaska at the time the act in question was passed. It will also be remembered that by the acts of Congress, the Constitution of the United States and its beneficent provisions has been extended to Alaska, impliedly, at least, if not in express terms.

Under the laws of the United States license taxes of the form attempted to be enforced in Alaska are not collected in any other part of the United States. On the face of the proposition it would seem that the question of uniformity of taxation under the Constitution, is fairly raised. This question was considered at great length by the Supreme Court of the United States in the case of Downes *v.* Bidwell and the other "insular cases," and the arguments on all sides were practically exhausted.

It is a settled theory of the law that the Congress of the United States may create territorial governments in the territory belonging to the United States, under circumstances which seem to Congress sufficient to require such action. It has been the uniform
15 practice of the Congress in establishing these territorial forms of government, to provide for a system of taxa- whereby such government- when established, might be self-sustaining, if not wholly, at least to a very large degree. If Congress has power to authorize a territorial legislature to provide a system of taxation for a Territory—and this is unquestioned,—surely any power that Congress might delegate to another legislative body, it could exercise by direct legislation. That Congress may provide by direct legislation a system of taxation for the support of local government in the Territories and districts of the United States is, we think, practically unquestioned. Whether then, the question of uniformity of taxation arises under the statute now under consideration, depends, it would seem, upon the use of the moneys to be collected under this license law. If for support of local government in the district of Alaska, no question of uniformity can arise. If for general purposes of the United States and to be covered into the Treasury of the United States for general purposes, then the burdens placed upon the citizens of Alaska are excessive and not uniform with the taxes levied in other portions of the United States. It therefore becomes necessary, in considering this question, to examine briefly the purposes of Congress in the levy of these license taxes.

Under sec. 7 of the Political Code for Alaska passed June 6, 1900, it is provided that the clerk of the court "shall also receive all moneys collected from licenses, fines, forfeitures, or in any other case, except from violations of the customs laws, and shall apply the same to the incidental expenses of the proper division of the district court, and the allowance thereof as directed by the judge, and shall account for the same in detail and for any balance on account

thereof quarterly, to and under the direction of the Secretary of th Treasury."

It will be observed that under the terms of this section the money realized from the collection of licenses — taxes are to be disbursed for the expenses of the proper division of the district court
16 *and the balance of the money, if any is to be accounted for in report to the Secretary of the Treasury.* Among the items of expenses to be paid by the court is the construction of court houses and jails, the court house not to exceed in cost five thousand dollars, and for a jail, three thousand dollars. It is also provided the *one-half of the moneys* paid in on these license taxes in incorporated towns shall be paid over to the treasurers of such towns for school and other purposes. It is further provided that *one-half the moneys collected outside incorporated towns and to be turned into the Treasury of the United States* is to be expended for school purposes under the direction of the Secretary of the Interior.

It will be observed, therefore, that the larger portion of all the moneys collected from license taxes are to be expended for the purpose of local government within the district; but in the tenth section of the same act of Congress making further provision for a civil government in Alaska, it is provided,

"Each clerk shall collect all moneys arising from the fees of his office or on any other account authorized by law to be paid or collected bt him * * * and any balance remaining in his hands, after all payments ordered by the court shall be made, shall be by him covered into the Treasury of the United States at such times and under such rules and regulations as the Secretary of the Treasury shall prescribe."

Does this language "covered into the Treasury of the United States" necessarily mean that the money shall go into the Treasury for general purposes and to be paid out upon appropriations made by the Congress of the United States? If this is the necessary construction of the statute, and if there be any such balance to go into the United States Treasury, it would seem that as to such balance there was a gathering of taxes contrary to the constitutional provision of uniformity. It is a fact about which there can be no dispute that the expenditures of the General Government
17 for local government in the district of Alaska far exceeds the moneys collected from license taxes; but the salaries of officers, such as governor, secretary, judges, marshals &c. are paid out of the national Treasury on appropriations made by Congress from moneys in the Treasury of the United States. Such expenditures on appropriations made by Congress, though for the support of local government in Alaska, can hardly be deemed the application of moneys realized from the collection of license taxes within the district of Alaska, to the support of local government in said district. But where the language of the statute is "covered into the Treasury of the United States * * * under such rules and regulations as the Secretary of the Treasury may prescribe," such "rules and

regulations" might refer to the purpose for which the money was to be paid into the Treasury and *and* that purpose, its expenditure for local government.

Should we not therefore indulge in the presumption that by the use of the words "covered into the Treasury under rules and regulations prescribed by the Secretary of the Treasury" that Congress intended money should be covered into the Treasury for lawful purposes viz. to be expended for local government rather than for an unlawful purpose, in violating the constitutional provision of uniformity.

It may be said in this connection that statutes should be given such a construction as will effectuate their purpose where that is possible, and that no statute should be held invalid if it can be so construed, considering all its provisions, as to make it a valid statute. That is, the statute should be given a construction that will make it valid and effectual if it can be fairly done, rather than to give it a construction that will render it void. The legislative body, in passing upon the statute under consideration, has necessarily
18 passed upon its validity and constitutionality, or it would never have been enacted by Congress, or received the signature of the President. Constitutional courts that may properly pass upon the constitutionality of statutes, never hold them unconstitutional and void unless no reasonable construction can be given them that will avoid such necessity. This court is a creature of legislation—is not a constitutional court, but a court created by an act of Congress. It would be a strange conclusion indeed, for the creature of Congress to pronounce void the laws enacted by its creator. Under no circumstances, would this court pronounce the act of Congress providing for these licenses, unconstitutional and void. It is the opinion of this court that any such action would be a wrongful assumption of power and authority.

Therefore, without discussing the questions involved in the application for a writ of *habeas corpus*, or the propriety of discharging the said Wynn-Johnson from custody under the claimed unconstitutionality of the license law, the court will refuse to discharge the said Johnson from custody and will remand him to the custody of the United States marshal to be held by him for trial on the indictment presented against him, and it is so ordered.

Dated Juneau, Alaska, June 20th, 1902.

M. C. BROWN, *Judge.*

(Endorsed:) No. 138 In the U. S. district court for the district of Alaska, div. # 1 C. E. Wynn-Johnson, petitioner *v.* James M. Shoup, U. S. marshal, &c. On petition for writ of *habeas corpus.* Decision filed Jun- 20 1902 W. J. Hills, clerk, by —— —— deputy.

19 *Order.*

In the United States District Court for the District of Alaska, Div. No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus.*

This cause having been submitted to the court upon brief of the parties hereto, and the court having had the same under consideration; and now being fully advised in the premises, denies the relief prayed for in the said writ of *habeas corpus* and refuses to discharge the said C. E. Wynn-Johnson from the custody of the United States marshal for division No. 1 of the district of Alaska, all in accordance with the decision this day handed down by the court and placed on file; and the clerk of this court is hereby directed to prepare and deliver to the United States marshal a certified copy of this order directing the said C. E. Wynn-Johnson to be remanded to the custody of the United States marshal to be held by him for trial on the indictment presented against him.

Jun- 20 1902

M. C. BROWN, *Judge.*

(Endorsed:) In the United States district court for the district of Alaska, div. No. 1. In the matter of the application of C. E. Wynn-Johnson for a writ of *habeas corpus.* Order. Filed Jun- 20 1902 W. J. Hills, clerk, by —— —— deputy. Bail fixed at the sum of $5000.00 W. J. Hills, clerk U. S. dist. court for district of Alaska, division No. 1.

No. 1.

20 *Order.*

In the United States District Court for the District of Alaska, Div.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus.*

The relief prayed for under and by virtue of said writ of *habeas corpus* having been on a prior day of this court denied and the defendant remanded to the custody of the United States marshal;

It is ordered by the court that the said defendant be discharged upon his giving to the marshal a good and sufficient bond in the sum of $5000.00 conditioned for his appearance for trial on the first day at the next regular term of this court, and to continue his attendance from day to day thereafter *and* until discharged, or until the further order of the court.

M. C. BROWN, *Judge.*

(Endorsed:) No. 138. In the United States district court for the district of Alaska, div. No. 1. In the matter of the application of C. E. Wynn-Johnson for a writ of *habeas corpus*. Order. Filed Jun- 21 1902 W. J. Hills, clerk, by —— —— deputy.

21 In the United States District Court for the District of Alaska, Division No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus*.

You will please take notice that the defendant, C. E. Wynn-Johnson, in the case of the United States *vs.* Moore's Wharf Company, a corporation, and C. E. Wynn-Johnson, and the applicant in the matter of the application of C. E. Wynn-Johnson, for a writ of *habeas corpus*, above named, hereby appeals to the Supreme Court of the United States, from the judgment therein rendered and entered, in said United States district court, at Juneau, for the district of Alaska, division No. 1, on the 20th day of June, 1902, in favor of the plaintiff, The United States, and against the applicant herein, in the above entitled matter, and from the whole thereof.

Juneau, Alaska, June 20th, 1902.

JOHN G. HEID,
*Attorney for Applicant, C. E. Wynn-Johnson.*

To the United States of America and Robert A. Friederich, Esq., U. S. attorney for Alaska, div. No. 1:

Due service of a copy of the above notice of appeal is hereby admitted, at Juneau, Alaska, this 20th day of June, 1902.

ROB'T A. FRIEDRICH,
*U. S. Att'y for Alaska, Div. No.* 1.

(Endorsed:) No. 138 In U. S. dist. court, at Skagway for Alaska; division No. 1. In the matter of the application C. E. Wynn-Johnson, for a writ of *habeas corpus* Notice of appeal Filed Jun- 21 1902 W. J. Hills, clerk, by —— —— deputy. J. G. Heid att'y for applicant.

22 In the United States District Court, at Skagway, for the District of Alaska, Division No. 1.

UNITED STATES OF AMERICA
*vs.*
MOORE'S WHARF COMPANY and C. E. WYNN-JOHNSON.

An indictment having been found on the 16th day of February, 1901, in the district court of the United States, at Skagway, for the

district of Alaska, division No. 1, charging the Moore's Wharf Company and said C. E. Wynn-Johnson with the crime of prosecuting the business of a public wharf without a license, and he having been duly admitted to bail in the sum of five thousand dollars.

We, Lee Guthrie, of the city of Skagway, Alaska, by occupation, merchant and property owner, and J. Bernard Moore, of said city of Skagway, Alaska, by occupation warehouseman, hereby undertake that the above named C. E. Wynn-Johnson shall appear and answer the indictment above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court; and if convicted shall appear for judgment and shall render himself in execution thereof, or if he fail to perform either of those conditions that we will pay to the United States the sum of five thousand dollars.

Witness our hands and seals this 15th day of July, 1902.

C. E. WYNN-JOHNSON. [L. S.]
J. BERNARD MOORE. [L. S.]
LEE GUTHRIE. [L. S.]

23 UNITED STATES OF AMERICA, *District of Alaska,* } ss:

Lee Guthrie, whose name is signed to the foregoing bail bond, being first duly sworn says, that he is a resident and householder within the district of Alaska, and that he is worth the sum of five thousand dollars, over and above all his just debts and liabilities, exclusive of property exempt from execution.

LEE GUTHRIE.

Subscribed and sworn to before me this 15th day of July, A. D. 1902.

[SEAL.] M. H. McLELLAN,
*Deputy Clerk.*

UNITED STATES OF AMERICA, *District of Alaska,* } ss:

J. Bernard Moore, whose name is signed to the foregoing bail bond, being first duly sworn says, that he is a resident and householder within the district of Alaska, and that he is worth the sum of five thousand dollars, over and above his just debts and liabilities, exclusive of property exempt from execution.

J. BERNARD MOORE.

Subscribed and sworn to before me this 15th day of July, A. D. 1902.

[SEAL.] M. H. McLELLAN,
*Deputy Clerk.*

(Endorsed:) No. 138. In U. S. district court, at Skagway; for Alaska division No. 1. United States *vs.* Moore's Wharf Co. and C. E. Wynn-Johnson. Bail bond. Filed July 15, 1902. W. J. Hills, clerk, by M. H. McLellan, deputy.

24 *Order.*

In the United States District Court for the District of Alaska, Div. No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus*.

This cause having been submitted to the court upon brief of the parties hereto, and the court having had the same under consideration, and now being fully advised in the premises, denies the relief prayed for in the said writ of *habeas corpus* and refuses to discharge the said C. E. Wynn-Johnson from the custody of the United States marshal for division No. 1 of the district of Alaska, all in accordance with the decision this day handed down by the court and placed on file; and the clerk of this court is hereby directed to prepare and deliver to the United States marshal a certified copy of this order directing the said C. E. Wynn-Johnson to be remanded to the custody of the United States marshal to be held by him for trial on the indictment presented against him.

Jun- 20 1902

M. C. BROWN, *Judge*.

UNITED STATES OF AMERICA, }
*First Division, District of Alaska.* }

The above is a true copy from the record of an order made by the above court on the 20 day of June 1902.

Witness my hand and the seal of said court this 20 day of June, 1902.

[SEAL.] W. J. HILLS, *Clerk*.

25 UNITED STATES, }
*District of Alaska, Division No.* 1, } ss:

I certify that the within order came into my hands for service on June 20, 1902, and that I served the same on July 15, 1902, by placing the within named defendant C. E. Wynn-Johnson, under arrest, and that the said defendant did then and there give a good and sufficient bond for his appearance at the October term of the

United States district court, at Skagway, in the sum of $5000.00, and was thereupon released from custody.

Dated Skagway, Alaska, July 15, 1902.

JAMES M. SHOUP,
*U. S. Marshal,*
By JOHN W. SNOOK,
*Deputy U. S. Marshal.*

Marshal's fees: 1 service $3.00

(Endorsed:) No. 138. In the United States district court for the district of Alaska, div. No. 1. In the matter of the application of C. E. Wynn-Johnson for a writ of *habeas corpus.* Order. Filed Jul- 15, 1902 W. J. Hills, clerk, by M. H. McLellan, deputy. Bail fixed at $5000.00. W. J. Hills, clerk U. S. dist. court for district of Alaska, division No. 1.

26 In the United States District Court for the District of Alaska Division No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus.*

*Bill of Exceptions.*

Be it remembered that the above entitled matter came on regularly to be heard at Juneau, Alaska, on the 20th day of June, 1902 before the Honorable Melville C. Brown, district judge for the said district of Alaska, division No. 1; the applicant, C. E. Wynn-Johnson, appearing by John G. Heid, his attorney, and the United States being represented by Robert A. Friederich, Esq., U. S. attorney for Alaska, said division No. 1, at which time the following proceedings were had and taken:

In the United States District Court for the District of Alaska Division No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus.*

This cause having been submitted to the court upon the brief of the parties hereto, and the court having had the same under consideration, and now being fully advised in the premises
27 denies the relief prayed for in the said writ of *habeas corpus* and refuses to discharge the said C. E. Wynn-Johnson from the custody of the United States marshal for division No. 1, of the district of Alaska, all in accordance with the decision this day handed down by the court and placed on file; and the clerk of this

court is hereby directed to prepare and deliver to the United States marshal a certified copy of this order directing the said C. E. Wynn-Johnson to be remanded to the custody of the United States marshal to be held by him for trial on the indictment presented against him.

Jun- 20, 1902.

M. C. BROWN, *Judge.*

To which decision and ruling of the court, applicant, the said C. E. Wynn-Johnson, by his counsel, then and there excepts, and an exception to said decision and ruling of the court was allowed to said applicant.

Endorsed: No. 138. In the U. S. district court, for Alaska, div. No. 1, at Skagway. In the matter of the application of C. E. Wynn-Johnson, for a writ of *habeas corpus.* Bill of exceptions. Filed Jan. 16, 1903. W. J. Hills, clerk. J. G. Heid, att'y for applicant, C. E. Wynn-Johnson.

28 In the United States District Court for the District of Alaska, Division No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus.*

*Assignment of Errors.*

And now comes C. E. Wynn-Johnson, by John G. Heid his attorney, and says that in the records and proceedings in the above entitled matter there is manifest error in this, to-wit:

1.

That the United States district court for the district of Alaska, division No. 1, before which said matter was heard and tried, erred in denying to said applicant, C. E. Wynn-Johnson, the relief prayed for in the said petition for a writ of *habeas corpus*, filed herein by said applicant, and in refusing to discharge the said applicant, the said C. E. Wynn-Johnson, from the custody of the United States marshal, for the district of Alaska, division No. 1.

2.

That the United States district court, for the district of Alaska, division No. 1, erred in deciding and ruling that section 461, of the Alaska Criminal Code, (passed by an act of Congress of the United States), for the alleged and charged violation of which said section of said Alaska Criminal Code, said applicant is unlawfully imprisoned, detained, confined and restrained of his liberty, is constitutional, oper-

ative and of full effect, so as to compel a compliance with the terms of said section by said applicant, the said C. E. Wynn-Johnson.

29 3.

That the United States district court, for Alaska, division No. 1, erred in remanding the said C. E. Wynn-Johnson to the custody of the United States marshal, for the district of Alaska, division No. 1, to be held by said marshal for trial on the indictment presented, as in the record herein set forth.

Wherefore, the said C. E. Wynn-Johnson prays that the judgment of the said United States district court, for the district of Alaska, division No. 1, be reversed, and said U. S. district court for Alaska, division No. 1, be ordered to discharge the said C. E. Wynn-Johnson from custody.

JOHN G. HEID,
*Attorney for Appellant, C. E. Wynn-Johnson.*

Endorsed: In the U. S. district court for Alaska; division No. 1, at Skagway. In the matter of the application of C. E. Wynn-Johnson, for a writ of *habeas corpus*. Assignment of errors. Filed Jan. 16, 1903. W. J. Hills, clerk. J. G. Heid, att'y for applicant, C. E. Wynn-Johnson.

30 In the United States District Court for the District of Alaska, Division No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus*.

*Petition for Writ of Error.*

To the Honorable Melville C. Brown, judge of the United States district court for the district of Alaska, division No. 1:

The petition of C. E. Wynn-Johnson respectfully shows to this honorable court, as follows:

That your petitioner is the applicant for a writ of *habeas corpus*, in the above-entitled matter, and feeling himself aggrieved by the judgment entered thereon, on the 20th day of June, 1902, in pursuance of which said judgment, whereby, it was ordered, adjudged and decreed that, the relief prayed for by said applicant, C. E. Wynn-Johnson, in his petition for a writ of *habeas corpus*, be denied and is denied, and that the said applicant, the said C. E. Wynn-Johnson, be remanded to the custody of the U. S. marshal for the district of Alaska, division No. 1, to be held by said marshal for trial on the indictment presented against him.

Comes now John G. Heid, attorney for the said applicant, C. E. Wynn-Johnson, and petitions said court for an order allowing said

applicant, C. E. Wynn-Johnson, to prosecute a writ of error to the honorable, the United States Supr-me Court, under and according to the laws of the United States of America, in that behalf
31 made and provided and also that an order be made fixing the amount of security which the said applicant, C. E. Wynn-Johnson, shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Supreme Court.

And your petitioner, as in duty bound, will ever pray.

JOHN G. HEID,
*Attorney for Applicant, C. E. Wynn-Johnson.*

*Order.*

And now, to wit, on January 19th, 1903, it is ordered that the writ or error be allowed as prayed for.

M. C. BROWN, *Judge.*

Endorsed: No. 138. In U. S. district court, for Alaska, division No. 1, at Skagway. In the matter of the application of C. E. Wynn-Johnson, for a writ of *habeas corpus*. Petition for a writ of error. Filed Jan. 16, 1903, W. J. Hills clerk. J. G. Heid, att'y for applicant C. E. Wynn-Johnson.

32 In the United States District Court for the District of Alaska, Division No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus*.

Know all men by these presents, that we, C. E. Wynn-Johnson, of the city of Skagway, Alaska, plaintiff in error in the above-entitled matter, as principal, and John Olds, of the city of Juneau, Alaska, as surety, are held and firmly bound unto The United States of America, defendant in error, in the above-entitled matter, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said United States of America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 17th day of January, A. D. 1903.

Whereas, the above-named C. E. Wynn-Johnson is about to sue out a writ of error to the above-named court, to re-examine and reverse in the Supreme Court of the United States, the judgment rendered in the above-entitled matter by said district court of the

United States for the district of Alaska, division No. 1, and to obtain an order and judgment of said Supreme Court of the United States, that the petitioner or plaintiff in error have judgment entered in this court as prayed for in the petition filed herein, and that said plaintiff or petitioner may be restored to his liberty.

Now, therefore, the condition of this obligation is such that if the above-named C. E. Wynn-Johnson, plaintiff in error, shall prosecute his said writ of error to effect and answer all damages
33 and costs if he fails to make said writ of error good, and shall obey all judgments and orders entered against him by said Supreme Court of the United States, under and upon his said writ of error, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. E. WYNN-JOHNSON. [L. S.]
JOHN OLDS. [L. S.]

Executed in presence of—

J. BERNARD MOORE.
JOHN G. HEID.

UNITED STATES OF AMERICA, } ss:
*District of Alaska,* }

John Olds being duly sworn, deposes and says that he is the surety named in and who executed the foregoing bond; that he is a resident and householder within the district of Alaska, and is worth the sum of five hundred dollars, over and above all his debts and liabilities, exclusive of property exempt from execution.

JOHN OLDS.

Subscribed and sworn to before me this 17th day of January, A. D. 1903.

JOHN G. HEID,
*Notary Public for Alaska.*

The foregoing bond is hereby approved as to form, sufficiency of surety, and manner of execution.

M. C. BROWN, *Judge.*

Endorsed: No. 138. In U. S. district court for Alaska, division No. 1. In the matter of the application of C. E. Wynn-Johnson for a writ of *habeas corpus*. Bond on writ of error. Filed Jan. 19, 1903. W. J. Hills, clerk.

34 UNITED STATES OF AMERICA, } ss:
*District of Alaska,* }

I, W. J. Hills, clerk of the United States district court for the district of Alaska, division No. 1, hereby certify that the above and foregoing and hereunto annexed 33 pages are a full, true and correct transcript of the records and files of all the proceedings of the therein mentioned cause of "In the matter of the application of C. E. Winn-Johnson for a writ of *habeas corpus*, No. 138," as the same remains of record and on file in my office and in accordance with the command in the writ of error in said cause allowed.

I further certify that the costs of preparing and certifying this transcript, amounting to $16.35 have been paid to me by plaintiff in error.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be hereunto affixed at the town of Juneau in said district, division No. 1, the 22d day of January, 1903.

[Seal United States District Court, Alaska.]

W. J. HILLS, *Clerk*,
By J. J. CLARKE, *Deputy*.

35 In the United States District Court for the District of Alaska, Division No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus*.

*Writ of Error.*

The President of the United States of America to the judge of the United States district court for the district of Alaska, division No. 1, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said United States district court, for the district of Alaska, division No. 1, before you, in the matter of the application of C. E. Wynn-Johnson for a writ of *habeas corpus*, a manifest error hath happened, to the great damage of the said C. E. Wynn-Johnson, plaintiff in error herein, as by his complaint and petition appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington on the fourth Monday of February, next, in the said

Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court
36 may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 19th day of January, in the year of our Lord one thousand nine hundred and three.

[Seal United States District Court, Alaska.]

W. J. HILLS,
*Clerk of the U. S. District Court for the District of Alaska, Division No. 1,*
By J. J. CLARKE, *Deputy.*

Allowed by
M. C. BROWN, *Judge.*

37 [Endorsed:] No. 138. In U. S. dist. court, for Alaska; div. No. 1, at Skagway. In the matter of the application of C. E. Wynn-Johnson, for a writ of *habeas corpus*. Writ of error.

38 In the United States District Court for the District of Alaska, Division No. 1.

In the Matter of the Application of C. E. WYNN-JOHNSON for a Writ of *Habeas Corpus*.

*Citation.*

The United States of America to James M. Shoup, United States marshal for the district of Alaska, division No. 1, Greeting:

You are hereby cited and adm-ished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the fourth Monday of February, next, pursuant to a writ of error filed in the clerk's office of the United States district court, for the district of Alaska, division No. 1, in the matter of the application of C. E. Wynn-Johnson for a writ of *habeas corpus*, to show cause, if any there be, why the judgment rendered against the said C. E. Wynn-Johnson, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States Supreme Court, this 19th day of January, in the year of our Lord one thousand nine hundred and three.

M. C. BROWN.

Due and legal service of a copy of the above citation is hereby admitted at Juneau, Alaska, this 20th day of January, 1903.

THOS. R. LYONS,
*U. S. Attorney for Alaska, Div. No. 1.*

39 [Endorsed:] No. 138 In U. S. dist. court for Alaska; div. No. 1, at Skagway In the matter of the application of C. E. Wynn-Johnson for a writ of *habeas corpus*. Citation.

Endorsed on cover: File No. 18,905. Alaska D. C. U. S. Term No. 266. C. E. Wynn-Johnson, plaintiff in error, *vs.* James M. Shoup, United States marshal for the district of Alaska. Filed April 24, 1903. File No. 18,905.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

C. E. WYNN-JOHNSON,
*Plaintiff in Error,*

*vs.*

JAMES M. SHOUP, United States Marshal, for the District of Alaska.

No. 266.

**In Error to the District Court of the United States for the District of Alaska.**

## BRIEF FOR PLAINTIFF IN ERROR.

### Statement.

This case is before the Court on writ of error to the United States Court for the District of Alaska, Division No. 1, sued out by plaintiff in error on the 19th of January, 1903, directing that court to send its record and proceedings in the above-entitled cause to this Court, that the errors, if any, may be duly corrected and full and speedy justice done said plaintiff in error.

The proceeding in the court below was an application for a writ of *habeas corpus*, filed October 29, 1901, requiring

the marshal to produce the body of plaintiff in error before the court to do and receive what might then and there be considered by the court concerning him. The trial court has so tersely and accurately stated the facts as to the proceedings and the question involved that we quote from the same, pp. 10 and 11 of the record, as follows:

"At the Skagway, October 1901, term of the court one C. E. Wynn-Johnson and the Moore's Wharf Company were jointly indicted under sections four hundred and sixty and four hundred and sixty-one of the crimes act of the District of Alaska, for conducting a wharf, &c., without first having obtained a license therefor as required by law. A bench warrant was issued upon said indictment and the said C. E. Wynn-Johnson taken into custody by the United States marshal and brought into court. The said Johnson having failed and refused to give bail as required by law, he was retained in the custody of the United States marshal, and while so in custody he brought this proceeding in habeas corpus and prays to be discharged from custody.

"No objection is made to the indictment, either in form or substance, or to the writ under which the United States marshal holds the said Johnson in custody; but counsel for said Johnson alleges that the statute requiring the payment of this license fee is unconstitutional and void, and that the said Johnson should be discharged from custody for that reason. The alleged unconstitutionality of the act of Congress is predicated upon the claim that such statute is in violation of that provision of the Constitution requiring uniformity in the laying and collection of taxes in the District of Alaska; in other words that it is in violation of the first clause of sec. 8, art. 1, of the Constitution of the United States, which reads as follows:

> 'The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.'

"The Acts of Congress providing for customs duties and internal revenue have for years been extended to Alaska by express act of Congress, and all such collections of taxes and the laws under which made, were in force in Alaska at the time the act in question was passed. It will also be remembered that by the Acts of Congress, the Constitution of the United States and its beneficent provisions has been extended to Alaska, impliedly at least, if not in express terms

"Under the laws of the United States license taxes of the form attempted to be enforced in Alaska are not collected in any other part of the United States. On the face of the proposition it would seem that the question of uniformity of taxation under the Constitution, is fairly raised."

Upon the final hearing, June 20, 1902, the Court, declining to pass upon the alleged unconstitutionality of the law involved, refused to grant the writ and discharge the said Johnson, as prayed for in the petition, but remanded him to the custody of the marshal to be held for trial on the indictment presented against him as aforesaid

The applicant, on said 20th day of June, 1902, prayed an appeal to this Court, from said decision, and filed his Bill of Exception and Assignment of Errors.

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## Argument.

There is but one question involved in this case, and that is the constitutionality of sections 460 and 461 of "An Act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district", approved March 3, 1899. (30 Stat., 1336.)

Section 460 provides as follows:

"That any person or persons, corporations or company, prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain license so to do, from a district court or

subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit:"

Then follows a list of forty-two callings and occupations, among which, applicable to the present case, is the following:

"public docks, wharves and warehouses, one hundred dollars per annum".

Section 461 makes a violation a misdemeanor punishable by fine in a sum equal to the amount of the license, for the first offense; for the second offense double that sum, and for a third offense three times the amount of the license and imprisonment for not less than thirty days and not more than six months. It also provides that each day's business done or attempted to be done in violation of the act shall constitute a separate and distinct offence.

Section 463 is as follows:

"That the licenses provided for in this Act shall be issued by the clerk of the district court or any subdivision thereof, in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and of the action of the court thereon. The clerk of the court shall be entitled to receive for each applicant for a license a fee of five dollars, and no other or additional compensation shall be paid such clerk for his services in connection with such license or the issue thereof; *And provided*, That the clerk of said court and each division thereof shall give bond or bonds in such amount as the Secretary of Treasury may require and in such form as the Attorney General may approve, and all moneys received for licenses by him or them under this Act shall be covered into the Treasury of the United States, under such rules and regulations as the Secretary of Treasury may prescribe."

By subsequent legislation (Acts of June 6, 1900, 31 Stat. L., 320, and March 3, 1901) the license tax on public docks, wharves and warehouses, was increased, by the Act of June 6, 1900, to "ten cents per ton on freight handled or stored;" and by the latter act, fifty per cent. of these license fees were directed to be spent for school purposes in Alaska.

The trial judge, although holding that his court not being a constitutional court, but a creature of Congress, had no power to declare a law of Congress unconstitutional, yet entered into an elaborate discussion of the reasons urged by plaintiff in error why the statute should be so held, and after quoting the statute, said:

"Does this language 'covered into the Treasury of the United States' necessarily mean that the money shall go into the Treasury for general purposes and to be paid out upon appropriations made by the Congress of the United States? If this is the necessary construction of the statute, and if there be any such balance to go into the United States Treasury, it would seem that as to such balance there was a gathering of taxes contrary to the constitutional provision of uniformity. It is a fact about which there can be no dispute that the expenditures of the General Government for local government in the district of Alaska far exceeds the moneys collected from license taxes; but the salaries of officers such as governor, secretary, judges, marshals, &c., are paid out of the National Treasury on appropriations made by Congress from moneys in the Treasury of the United States. Such expenditures on appropriations made by Congress, though for support of local government in Alaska, can hardly be deemed the application of moneys realized from the collection of license taxes within the district of Alaska, to the support of local government in said district. But where the language of the statute is 'covered into the Treasury of the United States ——— under such rules and regulations as the Secretary of Treasury may prescribe,' such 'rules and regulations' might refer to the purpose for which the money was to be paid into the

Treasury and that purpose, its expenditure for local government.

Should we not therefore indulge in the presumption that by the use of the words 'covered into the Treasury under rules and regulations prescribed by the Secretary of Treasury' that Congress intended money should be covered into the Treasury for lawful purposes, viz., to be expended for local government rather than for an unlawful purpose, in violating the constitutional provision of uniformity."

It is thus conceded by the trial court that unless the provision in the law authorizing the Secretary of the Treasury to make "rules and regulations" governing the "covering into the Treasury of the United States" of the balance of the moneys remaining after the expenditure for schools of fifty per cent thereof, and incidental expenses of the court, stamps the whole amount as *local taxes*, the act is unconstitutional and void. We will therefore proceed to the discussion of this proposition.

It will be observed that the "rules and regulations" which the statute authorizes the Secretary of Treasury to prescribe, upon which provision the trial judge based his opinion, by its very terms apply *only* to "covering the money *into* the Treasury" and in no wise affect its disbursement or the purpose for which it may be used. It is therefore of no importance whatever in determining the character of the legislation. Moreover, we are not permitted to indulge in presumptions as to the use of money once "covered into the Treasury" by law. The Constitution settles that question beyond the possibility of a doubt. Article 1, section 9, clause 7 of that instrument is as follows:

"No money shall be drawn from the Treasury but in consequence of appropriations made by law".

It follows, therefore, that money covered into the Treas-

ury can be withdrawn only upon *appropriation by Congress.* Neither the Secretary nor the courts have the power to disburse a single cent otherwise. Hence, the funds arising from licenses in Alaska, when they reach the Treasury, under the law, or the rules and regulations which the Secretary may prescribe, become *eo instanti* a part of the general public funds, no more charged with payment of the local expenses of the District of Alaska than are the moneys arising from customs, or internal revenue, collected there, or funds collected in Maine or California.

But the theory of the trial court that these funds might have been made local by rules and regulations which the Secretary of Treasury was authorized to prescribe is shown to be erroneous by the letter of the Acting Secretary appended hereto as Exhibit "A", from which the Court will see that *no rules or regulations* were ever promulgated by that officer.

That letter also shows that of the license fees collected in Alaska in the years 1900 to 1903, both inclusive, and six months of the year 1904, the following sums were covered into the Treasury as provided by law.

*Statement of Receipts from License Fees in Alaska.*

| Year. | License fees. | License fees collected outside of incorporated towns. | License fees collected in incorporated towns. |
|---|---|---|---|
| 1900 | $157,234.94 | | |
| 1901 | 147,255.33 | | |
| 1902 | 1,477.49 | $71,864.82 | $22,463.30 |
| 1903 | ..... | 46,413.98 | 26,985.00 |
| 6 mos. of 1904 | ..... | 40,921.81 | 23,931.78 |
| Total | $305,967.76 | $159,200.61 | $73,380.08 |

It also appears that of said sum of $305,967.76, the sum of $98,642.02, being a part of the amount collected

outside of incorporated towns, has been set aside for expenditure by the Secretary of the Interior for school purposes under the provisions of the Acts of March 3, 1901, and March 2, 1903, and *all of the balance* is in the *general fund of the Treasury.*

It is thus made clear that the sum of $207,325.74, arising from such license fees has been covered into the Treasury, as balances, after the payment by the clerks of the Courts of all sums authorized to be disbursed by them under the law, and the setting aside of the sum required by the Secretary of the Interior for schools. The Secretary also states that these fees (those collected outside of incorporated towns) together with the license fees collected in incorporated towns, " were covered into the Treasury *as a part of its general fund.*"

We have thus shown that the theory upon which the trial court based its opinion is erroneous for two reasons:

First: Because, under the Constitution, no money can be drawn from the Treasury but in consequence of appropriations made by law; and

Second: Because the Secretary of the Treasury made *no rules or regulations* under the Act.

## Not Local but General Taxation.

That taxes levied by Congress, which, when collected are required to be covered into the Treasury of the United States, and when thus covered in, become, in the language of the Secretary, " a part of the general fund of the Treasury," and under the Constitution can be drawn out only on appropriation by Congress, are general and *not local* should require no argument.

That a part of the taxes raised by such Act are directed to be expended in the community where collected, for local

purposes, is of no consequence, so long as *any part* of it goes into the general fund of the Treasury. For if Congress has the power to violate the principle of uniformity prescribed by the Constitution as to fifty per cent. of the taxes raised, it has the power likewise to violate it as to the whole of such taxes.

*The Acts violate Sec. 8, Art. 1 of the Constitution.*

We assume that it will not be disputed that if not local taxation it violates the first clause of Sec. 8, Art. 1, of the Constitution of the United States, which reads as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

It will not be contended that such taxes are uniform throughout the United States, but in point of fact it is admitted by the trial Court that they are not levied in any other part of the United States.

The true rule upon this subject was stated by this Court, Mr. Justice Miller delivering the opinion, in the case of Edye *vs.* Robertson collector, (112 U. S., 580) as follows:

"The tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

In that case the Court illustrated the proposition as follows:

"Is the tax on tobacco void, because in many of the States no tobacco is raised or manufactured? Is the tax on distilled spirits void, because a few States pay three-fourths of the revenue arising from it?"

But, in the case at bar, although the same occupations

are followed in almost, if not quite every State and Territory throughout the United States, these license taxes are confined by these Acts to Alaska alone.

If it be contended that they may fall under the police power, and may be for regulation or restriction, as is usual in the sale of liquors; we answer, that license can be required under that power only in cases when the calling is dangerous to the public either directly or incidentally. Hence, in the case at bar, which does not fall within such class, it must be exercised, if at all, under the power of taxation. Teideman on State and Federal Control of Persons and Property, Sec. 119, p. 482.

In order to justify a restrictive license, the business must itself be of such a nature that its prosocution will do damage to the public whatever may be the character of the qualification of those who engage in it. The power of license, as a police regulation, involves the power to prohibit under pain or penalty without a license and hence cannot apply to harmless callings. Tiedeman on State and Federal Control of Persons and Property, pp. 487 and 493.

This Court, in the case of Lawton *vs.* Steele, 152 U. S., 133, Mr. Justice Brewer delivering the opinion of the Court, in speaking of the *limits* of the police power, said:

"It is universally conceded to include everything essential to the public safety, health and morals. * * * But the legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations."

We respectfully submit that the decision of the United States District Court for the District of Alaska should be reversed and the plaintiff in error should be released on the grounds claimed by him, viz: that the Acts requiring a

license to follow a lawful, harmless occupation, confined as they are to Alaska, are unconstitutional, being a violation of the uniformity clause of the Constitution, as applied to the subject of taxation.

Respectfully submitted,

S. M. STOCKSLAGER,
GEORGE C. HEARD.

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**Exhibit "A."**

Division of Bookkeeping and Warrants.
Q.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON,
*April 14, 1904.*

MESSRS. STOCKSLAGER & HEARD,
*Attorneys-at-Law,*
McGill Building, Washington, D. C.

GENTLEMEN:

In reply to your communication of the 12th instant relative to the receipts from license fees in Alaska and their disposition, and asking for a copy of any regulations prescribed by the Secretary of the Treasury in connection therewith, I have to state as follows:

*Statement of Receipts from License Fees in Alaska.*

| Year. | License fees. | License fees collected outside of incorporated towns. | License fees collected in incorporated towns. |
|---|---|---|---|
| 1900 | $157,234.94 | | |
| 1901 | 147,255.33 | | |
| 1902 | 1,477.49 | $71,864.82 | $22,463.30 |
| 1903 | ..... | 46,413.98 | 26,985.00 |
| 6 mos. of 1904 | ..... | 40,921.81 | 23,931.78 |
| Total | $305,967.76 | $159,200.61 | $73,380.08 |

The sum of $305,967.76 received from "license fees" was covered into the Treasury by the clerks of court in one sum prior to the receipt of instructions from the Department of Justice to deposit them under separate heads. These fees, together with the license fees collected in incorporated towns, were covered into the Treasury as a part of its general fund.

Of the sum of $159,200.61 received from "license fees collected outside of incorporated towns," $98,642.02 have been set aside for expenditure by the Secretary of the Interior for school purposes under the provisions of the acts of March 3, 1901 (31 Stat., p. 1438) and March 2, 1903 (32 Stat., p. 946), and the balance is in the general fund of the Treasury.

In addition to the above amounts, the following sums have been covered into the Treasury by the clerks of court in Alaska: Funds other than license fees available for court expenses, $18,895.07; funds other than license fees not available for court expenses, $17,772.35.

No regulations have been prescribed by the Secretary of the Treasury governing the deposit of money under the Alaskan license laws, but a pamphlet containing detailed instructions in regard to the collection and deposit of license fees and other moneys by the clerks of court has been issued by the Department of Justice, a copy of which may be obtained on application to the Attorney-General.

Respectfully,

C. H. KEEP,
*Assistant Secretary.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1903.

C. E. WYNN-JOHNSON,
Plaintiff in Error,

*vs.*

JAMES M. SHOUP, United States Marshal for the District of Alaska.

No. 266.

***In Error to the District Court of the United States for the District of Alaska.***

## REPLY BRIEF FOR PLAINTIFF IN ERROR.

### *Correction.*

By leave of court first obtained, we file brief in reply to the argument of the Honorable Attorney General filed in behalf of the defendant in error.

Before proceeding to reply we call the attention of the court to an error in the balances, stated on page 8 of the original brief, to have been covered

into the Treasury of the United States from the District of Alaska on account of license taxes since the passage of the law in controversy. The correct amount, as shown by the Secretary's letter, is $439,906.43 instead of $207,325.74 as stated by us.

***The positions Assumed by Defendant in Error.***

Counsel for defendant in error, at page 4 of his brief, states the questions involved in the case as follows:

***Questions of Law.***

I.

"It is suggested, in behalf of the Government, that this writ of error should be dismissed for the reason that it appears from the record that the *habeas corpus* proceedings in the court below was had before the United States district judge of Alaska sitting as a judge and not as a court.

II.

"The other question of law presented by this appeal is the constitutionality of section 460, of Title II, of the Act of Congress of March 3, 1899 (30 Stat., 1253, 1336), as amended by the Act of June 6, 1900 (31 Stat., 321, 330), imposing license fees for prosecuting certain specified lines of business and trade in the Territory of Alaska."

The contention of the Government as to the second proposition is thus stated in the brief in the Binns case referred to and made part of the brief in this case:

"The Government contends that such law is constitutional for the reason that Alaska is territory *belonging to the United States*, and that Congress is authorized to impose these license fees not by reason of the general power of taxation provided for in Article I, section 8, of the Constitution, but from the plenary power 'to make all needful rules and regulations respecting the territory or other property belonging to the United States' (Article IV, section 3, paragraph 2), and that the exercise of such power is not subject to the provisions limiting the general power of taxation either as to apportionment or uniformity."

This proposition is subdivided by him as follows:

(*a*) "The license fees imposed by this law are a part of a penal code, and in the nature of police regulations, which, in the judgment of Congress, are necessary for the government of the Territory of Alaska by reason of its social conditions."

(*b*) "Congress has the power to license various trades and occupations in the Territories independently of and apart from the power to tax, and the mere fact that revenue is derived as an *incident* to the exercise of such power will not operate to characterize the license fee as a tax."

(*c*) "If taxes at all, these license fees are *local taxes* imposed by Congress as the legislature of Alaska, and paid into the Treasury of the United States as the only treasury of Alaska, and *obviously* intended to meet the expenses of governing that Territory."

(*d*) "Congress could not make these licenses uniform throughout the United States."

(*e*) "Admitting, for the purpose of argument, that these license fees are *local taxes* imposed by Congress in the Territory of Alaska and appropriated by Congress to the *support of the General Government*, we assert that such a law would be constitutional under the plenary power of Congress to govern the Territories."

In conclusion counsel, while suggesting that although intimations were given by some of the members of this court in the case of Downes *vs.* Biddell (182 U. S., 244), that Alaska had been "incorporated" and that the general taxing clause of the Constitution extended to that District, yet it had never been directly so decided, but that, in his opinion, that question is not necessarily involved in this case. We will take up these propositions in the order in which they are presented by counsel for defendant in error.

I.

***The Proceeding Below was in Court.***

As to the "suggestion" that the suit should be dismissed for the reason that the record shows the proceeding below was "before the judge sitting as a judge and not as a court," we insist counsel is mistaken as to what the record shows. Examination of the record shows that every step taken in the proceedings below, from the filing of the petition to the final order, was taken *in court.*

At page 1 the caption reads as follows:

"UNITED STATES OF AMERICA,
*District Court of Alaska, Division No. 1,* } *ss:*

Pleas and proceedings begun and held in the District Court of the United States for the District of Alaska, at the October term, 1901.

In the Matter of the Application of C. E. Wynn-Johnson for a writ of *habeas corpus*, No. 138.

On October 29, 1901, the plaintiff filed his petition in the said cause, which is in the words and figures following, to wit:"

Then follows copy of the petition addressed to the judge of the court. This is endorsed as follows:

"No. 138. In the U. S. Dist. Court for Alaska, Div. No. 1. In the matter of the application of C. E. Wynn-Johnson for a writ of *habeas corpus*. Petition. Filed Oct. 29, 1901. W. J. Hills, clerk, by —— ——, deputy. J. G. Heid, att'y for petitioner" (p. 2).

This proves conclusively that the proceeding was begun in court, the case docketed, numbered, and properly filed by the clerk. And, while it is true, as stated by counsel, the writ directed the marshal to have the prisoner before the judge, the record shows (bottom p. 3) the order was made: "In the United States District Court for the District of Alaska, Division No. 1," and reads as follows:

"It is ordered that a writ of *habeas corpus issue out of* and *under the seal of the United States District Court*, for the District of Alaska," etc.

*By the Court:*

M. C. BROWN, *Judge.*"

This was also endorsed by the clerk the same as the petition.

The writ itself commanded the marshal to have the prisoner before the judge "at the court-room of *said court* at Skagnay."

Again, at page 8 of the record, where the opinion is set out, the proceeding is entitled as follows:

"In the United States District Court for the District of Alaska."

Then follows the opinion of the court, in concluding which it is said:

"*The court* will refuse to discharge the said Johnson from custody," etc.

This is also filed and endorsed by the clerk of the court.

At page 12 we have the proceeding resulting in the final order, which is entitled as follows:

"In the United States District Court for the District of Alaska, Div. No. 1."

After entitling the case, it is said:

"The cause having been *submitted to the court* upon the brief of the parties hereto, and the *court*

having had the same under consideration," * * * "all in accordance with the decision this day *handed down by the court* and *placed on file;* and the clerk of this court is hereby directed to prepare," etc.

Also—

"It is ordered *by the court* that said defendant be discharged upon his giving to the marshal a good and sufficient bond in the sum of $5,000," etc., "for his appearance for trial."

If nothing else appeared in the record to indicate that the proceeding was in the court, and not before the judge in chambers, the final order and bond for the appearance of the prisoner in court for trial, in the language above set out, would prove conclusively that it was *in court.* (Palliser *vs.* The United States, 136 U. S., 256.)

The case at bar is clearly distinguishable from the case of Carpers *vs.* Fitzgerald (121 U. S., 87), cited and relied on by counsel for the Government.

In that case the record fully showed the proceeding was before the judge in chambers in Baltimore, and that he directed that the papers thus filed before him and his order be recorded in the circuit court at Richmond, Va., while in the case at bar the whole proceeding took place *in the court*, on the same day, was docketed, and entered of record *in the court*, then sitting, at the time.

## II.

### *The Unconstitutionality of the Law.*

Having shown in our original brief, by the letter of the Secretary of the Treasury, that the position of the trial court, that the provision in the law authorizing that official to make rules and regulations governing the covering of balances derived from these license fees into the Treasury of the United States made them local, was erroneous, for the reason that no rules or regulations of any kind had ever been presented under the Act, but, on the contrary, more than four hundred thousand dollars of such fees had been covered into the Treasury as part of its general fund, we deem it unnecessary to further consider it here.

Johnson, the plaintiff in error, was indicted for failing to take out a license under the Act in question, which provides that such a failure is a penal offense to be visited with fine and imprisonment, and makes each day's business done without such license a separate offense with increasing penalties. The amount of this license tax is not fixed by any certain sum to be paid in advance for doing such business, nor is any basis provided, by which such license tax may be determined at the time it is demanded, but it is dependent wholly upon the amount of business which may be done in the future, the Act providing that upon all freight handled or stored, a charge, or tax, of ten cents per ton should be paid.

It is submitted that this statute is too vague and uncertain to support a criminal indictment.

In his statement of the case, counsel at pp. 2 and 3 of his brief, says the plaintiff in error was indicted December 10, 1900, and that on March 12, 1901, he entered into a recognizance in the sum of $200 for his appearance to answer said indictment, and that on October 29, 1901, his sureties surrendered him to the Marshal, and that on the same day he filed petition for a writ of *habeas corpus*.

It is evident this referred to an indictment under the old law which fixed the license fee at $100 per annum, and not the one in this case. This is made clear by the statement of the court in its opinion on page 8 of the record, wherein it is stated that he was indicted at the Skaguay October, 1901, term of the court, and a bench warrant was issued upon said indictment and he was taken into custody and brought into court by the Marshal, and that having failed and refused to give bail filed his petition for the writ.

This is still further shown by the order of the court fixing the amount of bond required for his appearance for trial, upon the refusal of the court to discharge him on the writ of *habeas corpus*, as set out at p. 12 of the record, at the sum of $5,000. Why an increase of the bond from $200 to $5,000, unless it was based upon an indictment founded upon a statute fixing a higher penalty for its violation? Under the amendment of June 6, 1900, the license was fixed at "ten cents per ton of freight handled or stored," instead of $100 per year as

provided in the old law, and the indictment in this case is under that statute. The fact that the court fixes the bond at $5,000, was evidently to cover his liability under the law (which was arbitrarily put by the statute at the amount of the license fee), and the estimated costs.

We may, therefore, properly assume that the estimated amount of the license fee was near $5,000.

Certainly it will not be contended that this sum is the probable and reasonable cost of the issuing of the license and the regulation of a class of business which does not fall within the domain of police regulations, and requires none whatever. Again it is perfectly clear from the arrangement of the statute it was intended for revenue. It is graduated upon the amount of business done, the number of tons of freight handled or stored. This is true also of mercantile establishments. They are taxed from $10 to $500, graduated by the amount of business done. It seems unnecessary to argue that this is for revenue and not for regulation.

The first proposition of counsel for the Government, in support of the law, is that these license taxes are a part of a penal code, and in the nature of police regulations, the authority for the requirement of which is claimed to be Article IV, paragraph 2, of the Constitution, and hence not subject to the limitation in the uniformity clause.

Without questioning the police power of the Federal Government in the Territories, we insist that

the exaction of these license fees is not referable to that power, but fall clearly within the class of taxes for the purpose of revenue, and hence must be uniform throughout the United States.

Referring to the limitations on the exercise of the police power, the rule is thus stated at page 873, Vol. 8, Cycl. of Law and Procedure:

"The right to use property in the prosecution of any business which is not injurious or offensive to the community at large or to persons within its vicinity is one of the legal attributes of ownership of property of which the owner cannot be deprived by any State law or municipal ordinance."

The author cites the cases of People *vs.* Berrien, Circuit Judge, 124 Mich., 664, holding that an Act directed wholly at commission merchants selling farm products, requiring them to pay a license fee and give bond is unconstitutional and an unjustifiable interference with the rights of citizens to carry on legitimate business, and *In re* Hong Wah, 82 Fed., 623, holding a municipal ordinance declaring it a nuisance to carry on a public laundry except in certain designated places, was unconstitutional.

It is true, as held by this court in the case of Munn *vs.* Illinois (94 U. S., 113), business peculiarily and intimately affecting the public interest, may be regulated. But Judge Cooley, in his work on Const. Lim. (5 Ed., 737,) enumerates the classes of cases falling within that principle, as follows:

"1. When the business is one the following of which is not of right, but is permitted by the State as a privilege or franchise. Under this head would

be comprised the business of setting up lotteries, of giving shows, etc., by keeping billiard tables for hire, and of selling intoxicating drinks, when the sale by unlicensed parties is forbidden; also the cases of toll-bridge, etc. 2. When the State on public grounds renders to the business special assistance, by taxation or otherwise. 3. Where for the accommodation of the business some special use is allowed to be made of public property or of a private easement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public."

It is not pretended that the business in question in this case is of that class which might injuriously affect the lives, health, comfort, morals or quiet, and good order of the public, and which for the welfare of society might be restrained or regulated. A glance at the forty-two occupations or callings required by the Act to be licensed includes besides public docks and wharves, such as electric light and gas plants, fisheries, insurance agents, jewelers, quartz mills, mercantile establishments, planing mills, restaurants, sawmills, taxidermists, and waterworks. Can it be said these require regulation under the police power? We apprehend not.

It will be admitted, we have no doubt, not only that regulation of these occupations is not permissable, but that in no case has any regulation of any kind been prescribed under the law in controversy.

The doctrine of the Munn case, *supra*, goes only to the power to regulate, in the interest of the public, the business which the private owner has to a degree dedicated to the use of the public, and

in no sense to the power to tax for revenue. And it must be admitted the Alaska Act did not provide any regulations, or make any provision for the regulation of any of the lines of business embraced by it. No regulations of any kind were made or provided for except only that of *covering the revenue to be derived from the license taxes into the Treasury of the United States as a part of its general fund.* It follows that taxation and not regulation was the purpose of the Act, and that the doctrine of that case is not applicable.

Judge Cooley, in the 7th edition of his work on Constitutional Limitations, at page 71, after referring to the Munn case and stating that there was doubt in some cases, said that "some of the cases referred to seem clear enough. Ferries and public highways, and where individuals are permitted to establish them, they are allowed the sovereign prerogative of charging and collecting tolls, and tolls can never be taken except by permission of the State, which generally ought to and does prescribe limits."

### *It is a Revenue Measure.*

But even if the occupation in question, and all others covered by the Act, clearly fall within the class of cases subject to police regulation, yet it is apparent it was intended by Congress not only primarily, but *wholly* as a revenue measure, and in no sense as a police regulation. This being the

case the power to enact must be derived from the taxing clause of the Constitution which requires uniformity.

It is conceded by counsel for the Government in effect that if the primary object of the Act was revenue, it would not fall within the purview of Article IV, section 3, paragraph 2 of the Constitution, as contended by him, but the uniformity clause.

There can be no question that Congress intended the Act solely as a revenue measure. This fully appears from the proceedings in the two Houses, which is printed as an appendix to this brief.

It is shown that the Speaker of the House ruled the license feature of this criminal code out on a point of order as being a revenue measure and not germane to the bill. In the Senate it was reported as an amendment, and when it was being considered, upon inquiry by Senator Chandler of Senator Shoup, who was in charge of the bill, he stated:

"The Committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which, in their judgment, will *create a revenue* sufficient to defray all the expenses of the Government in the Territory of Alaska."

Again he said:

"They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the

judgment of the Committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there."

But, in our opinion, the law, on its face, proves conclusively that it is a revenue measure. For, aside from the fact that no regulation is provided for and no intimation is given that any is intended, the character of the business taxed and the amount of the license fees stamp it as a revenue measure pure and simple. Since counsel for the defendant in error has printed in the Binns brief, made a part of his brief in this case, as appears in Appendix "A" at page 41, a complete list of occupations taxed and the amount of annual tax required of each, we will not repeat it, but will call attention to the following:

Abstract offices pay $50; banks, $250; boarding houses having accommodations for ten guests or more, $15; brokers, $100; billiard-rooms, $15 per table; bowling alleys, $15; breweries, $500; bottling works, $250; cigar manufactories, $25; cigar stores, $25; drug stores, $50; electric light plants, $300; freight and transportation lines, $1.00 per ton; gas plants, $300; hotels, $50; public halls, $10; insurance agents and brokers, $25; jewelers, $25; quartz mills, $3 per stamp; mercantile establishments doing business of $100.000, $500; $75,000, $375; $50,000, $250; $25,000, $125; $10,000, $50; under $10,000, $25; under $4,000, $10; meat markets, $15; physicians, $50; planing

mills, $50; pawnbrokers, $300; pedlers, $25; patent medicine venders, $50; railroads, $100 per mile; restaurants, $50; real estate dealers and brokers, $50; ships and shipping, $1.00 per ton; sawmills, ten cents per thousand feet of lumber sawed; steam ferries, $100; toll road or trail, $200; tobacconists, $15; tramways, $10 for each mile; transfer companies, $50; taxidermists, $10; theatres, $100; waterworks, $50.

As to public wharves and docks, the Act of 1899 fixed the fee at $100, but by the amended Act of June 6, 1900, under which, according to the statement of the court, Johnson was indicted, it was fixed at ten cents per ton on all freight handled or stored. While the amount of the tax under this amendment does not appear in the record, the fact that the law fixes the penalty for a violation at the amount of the tax, and that the court, as shown by the record, fixed Johnson's bail for his appearance for trial at $5,000, shows that it must have approached that sum. And we are informed that it is over $4,000. Now, the rule is well settled that when the license fee charged is in excess of the cost of issuing license and necessary regulation of the business, *it is a tax*.

Royal *vs.* Virginia, 116 U. S., 572.

Cooley on Constitutional Limitations, secs. 201, 495, and 587.

Cooley on Taxation, secs. 531 and 592.

As to the distinction between tax and license for regulation, we beg to refer to—

Dillon on Municipal Corporations, 3d ed., secs. 358, 359, and 368, and authorities there cited.

As to the police power, we refer to—

Cooley on Taxation, pp. 75, 586, 587, and 605.
Burroughs on Taxation, p. 509.

Section 463 of the Act providing for the issuing of the licences provides as follows:

"The clerk of the court shall be entitled to receive from each applicant for a license a fee of five dollars, and no other or additional compensation shall be paid such clerk for his services in connection with such license or the issue thereof."

It thus appears that aside from the cost of regulation, which, as we have seen, is not prescribed and has never existed, the only other charge for which a license fee could be exacted under the police power, viz., the cost of issuing the license, is required by the law to be paid by the applicant in addition to the license fee fixed.

The results flowing from the operation of the law prove that the Speaker of the House of Representatives, who sustained the point of order made against the amendment that the license provisions were not germane to a bill providing a criminal code for Alaska, because they constituted a *revenue measure;* and Senator Shoup, who was in charge of the bill in the Senate, when he stated that the Com-

mittee on Territories considered the lines of business mentioned should bear a license which would produce revenue sufficient to defray all the expenses of the district, well understood what they were talking about. For the official report of the Secretary of the Treasury, printed as an exhibit to our original brief, shows that for the four years and a half the law has been in force, after deducting the fifty per cent. required to be expended for school purposes, and all sums authorized and required to pay incidental expenses of the court, as provided in section 7 of the Act of June 6, 1900, and for the construction and repair of jail buildings and court houses, as provided for in section 31 of said Act, and the further sum of $98,642.02, set aside for expenditure by the Secretary of the Interior for school purposes, there were covered into the Treasury of the United States, as "a part of its general fund," the sum of $439,926.43, or an average of $100,000 a year.

No other people have ever been thus taxed by our Federal Government. And yet it is sought to justify it as a reasonable exercise of the police power conferred upon Congress by the Constitution. We cannot believe this court will sustain that contention.

### *The Plenary Power of Congress to Govern the Territories.*

But, the Hon. Attorney General, disparing, as it seems to us, of being able to convince the court that these licenses are police regulations, as contradisguished from taxation; or that they are local taxes

levied upon Alaska by Congress, as its legislature, for local purposes, in the face of the official report of the Secretary of the Treasury, above referred to, takes the position that even if neither of these positions are tenable, and if in point of fact these extraordinary taxes are levied upon Alaska *locally* and expended by Congress under appropriations for *general purposes*, such act would be constitutional under the plenary power of Congress to govern the Territories.

Counsel cites no authority which supports his position, and we apprehend he can find none. At least, we have been unable to discover any decision or general authority in support of this unlimited power of unequal taxation. Of the deliberate taxation of the people of one section of the country for the benefit of all sections. Even if there were no specific limitations, the very proposition shocks our sense of justice, fairness, and equality of all our people before the law. And it is the more unjustifiable in this instance for the reason that it is notorious the people of Alaska are deprived of many of the benefits of goverment by reason of their isolation. This should afford a reason for lightening their burdens, whenever and wherever lawful and practicable, instead of heaping upon them unusual, unprecedented, and unjust ones.

The case of Gibbons *vs.* District of Columbia (116 U. S. 404), cited by counsel does not support his contention, but on the contrary, held that the power of Congress, legislating as a local legislature for the District, to levy taxes *for District purposes*

*only*, in like manner as a State legislature was unrestricted by constitutional provision. But, to levy such taxes for *general purposes*, is a very different proposition.

Neither does the quotation made from the opinion of Mr. Justice White in Downes *vs.* Biddle, *supra*, to the effect that both local and national taxes could have been levied upon Porto Rico, although she had no local government and was not represented in Congress, sustain the contention of counsel.

National taxes (internal revenue and customs) are collected in Alaska and have been since 1868, and we do not question the power of Congress to levy *local taxes* for *local purposes only*, in addition to these national taxes. But we do deny both the power and the justice of levying these local taxes for *general* purposes. Counsel admits that, so far as he knows, Congress has never attempted to tax the Territories *except* for *local purposes*. It is strange, if such power existed, Congress when sorely in need of national funds, as it has been many times in the early history of the country, did not resort to this method of raising revenue for the national government. And it is more surprising that that body should have availed itself of this source of revenue at the expense of our own hardy pioneers who have settled up that far north country under so many disadvantages and discouragements, at a time, too, when the Treasury was overflowing with a large surplus of national taxes.

"It has been forcibly, yet very truly, said that an unlimited power in the legislature to make any and everything lawful which it might see fit to call taxation, would, when plainly stated, be an unlimited power to plunder the citizen." Cooley on Taxation, 7 ed., p. 183, citing Saving and Loan Ass'n *vs.* Topeka (20 Wall., 655), and Cole *vs.* La Grange (113 U. S., 1).

In the former of these cases, Mr. Justice Miller, speaking for the court, said:

"The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such powers which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

***Conclusion.***

In conclusion, we insist:

1. The Act in question is unconstitutional because it violates the uniformity clause of the Constitution.

2. That the contention of counsel for defendant in error that these license fees are local taxes is erroneous, for the reason that a part of them are paid into the Treasury of the United States and become, in the language of the Secretary, "a part of its general fund," and under the Constitution can be drawn out only in consequence of appropriation by Congress.

3. They are not police regulations, for the reasons:

(*a*) Because it applies to occupations the regulation of which does not belong to the police power.

(*b*) Fee is in excess of the cost of license, which cost is also paid by applicant.

(*c*) Not intended as police regulations, as none were provided by Act.

(*d*) Discussion in Congress proves it was intended as a revenue measure.

(*e*) The license fees are graduated in the case at bar and other cases by the amount of business transacted, showing it is clearly for revenue and not for regulation.

4. It has not been shown that Congress has the plenary power to tax the people of the Territories *locally* to raise revenue to be used for general purposes, and as it would be unequal and unjust taxation, we do not think such contention can be sustained.

It follows that the final judgment of the trial court should be reversed, the law held to be unconstitutional and void, and the plaintiff in error released from custody and permitted to follow his harmless occupation without further annoyance.

Respectfully submitted.

S. M. Stockslager,
Geo. C. Heard,
*Attorneys for Plaintiff in Error.*

## APPENDIX.

At page 395, vol. 32, part 1, of the *Congressional Record* (3d Session, 55th Congress), what are now sections 460 and 461 of "An act to define and punish crime in the District of Alaska and to provide a code of criminal procedure for said District, approved March 3, 1899" (30 Stats., 1336), together with others, was offered by Mr. Tongue of Oregon.

At page 581, of the same volume, this amendment was reached for consideration and the following colloquay occurred:

The Speaker. Does the gentleman from Oregon regard this as an admissible amendment?

Mr. Tongue. Well, I submit it for the consideration of the House. There may be some question as to a part of it. I think there is no question as to the main part of the provision, however, the part which has not yet been read.

Mr. Grosvenor. Mr. Speaker, the point of order was reserved.

The Speaker. The point of order had been reserved, and the question is whether the amendment is admissible.

Mr. Loyd. I make the point of order that it is not germane to the bill.

Mr. Grosvenor. There is a better and an unanswerable point of order, that this is a measure to raise revenue, and has not come from the Committee on Ways and Means, and has not been referred to that committee. I do not see how you can raise revenue through the instrumentality of a code of criminal procedure for the District of Alaska.

Mr. Payne. This would amend the internal revenue laws so far as the District of Alaska is concerned.

The Speaker. It would amend the internal revenue laws, and would create a crime for the sake of punishing it.

Mr. Tongue. If I may be permitted, I will say that, so far as the main portion of this bill is concerned, it is now a crime in Alaska to import or sell liquor, and almost a crime to drink it there. This amendment proposes to modify the provision in reference to liquor. It seems to me that that portion of it, at least, is germane.

The Speaker. It proposes also to establish a scheme of taxation. This is a proposition to codify the criminal code of Alaska. It would look as if those two things were incompatible.

Mr. Tongue. Is the provision of this amendment modifying the liquor laws of Alaska incompatible with this bill? This bill deals with that subject.

The Speaker. The difficulty is, supposing you admit that it is not incompatible with that, there are, nevertheless, a great many other things in the

amendment which are entirely incompatible with that and everything else.

Mr. Tongue. Those can be separated. That objection applies only to the first section of the amendment, while the remaining portion deals exclusively with the liquor question, and modifies the present liquor laws as contained in this bill.

The Speaker. The amendment is offered as a whole. If any of it is obnoxious to the objection, it would all have to be ruled out.

Mr. Tongue. If the Chair thinks the first two sections inadmissible, then I ask to strike them out and move the remainder as an amendment.

Mr. Moody. I reserve the point of order against that, Mr. Speaker.

Mr. Dockery. What is the remainder?

Mr. Tongue. The remainder deals wholly with the liquor question.

At page 2235, vol. 32, part 3, same session, when the bill was being considered in the Senate, the provision with reference to license was offered as a substitute for sections 461 and 462, when Senator Chandler made the following observations and inquiries:

> "The sections which are now being read appear to be all new additions to the bill proposed by the Senate Committee on Territories. There appears to be a very elaborate system of taxation by license fees, and then there follow statutes regulating the sale of liquor in the

Territory. They seem to have been carefully prepared, but they will, of course, arouse some discussion before the bill is disposed of in the Senate. I only wish now to have from the chairman of the committee, whom I see present, or the Senator from Idaho (Mr. Shoup) tell me, if he can and is willing to do so, from the statutes of what other States the sections have been derived, if they have been taken from similar statutes in other States. What is the origin of those provisions? Are they original with the committee or are they taken from previous statutes in existence elsewhere?"

To his inquiries, Senator Shoup answered as follows:

"I wish to state to the Senator from New Hampshire that by previous agreement there is to be no action upon these amendments to-night. The license law is practically the same as that of the District of Columbia. I will state not for the purpose of discussion, but merely for the information of the Senator from New Hampshire that the license law is taken from that of the District. The Committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the Territory of Alaska."

To which Senator Chandler replied as follows:

"Do I understand the Senator to say that the body of the license taxes provided for and the liquor licenses are taken from the statutes prevailing in the District of Columbia?"

To which Senator Shoup again made answer as follows: "That is correct."

> "The details are somewhat different, but they are based so far as the liquor law is concerned, on the District law. The other licenses are not. They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the Territory of Alaska, including the Governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them."

To which Mr. Chandler again responded as follows:

> "Then I understand that the commmercial and business conditions in Alaska being peculiar, a special code of license taxes has been devised."

To which Mr. Shoup replied: "That is correct".

# In the Supreme Court of the United States.

OCTOBER TERM, 1903.

C. E. WYNN-JOHNSON, PLAINTIFF IN ERROR,
*v.*
JAMES M. SHOUP, UNITED STATES MARSHAL for the district of Alaska. } No. 266.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.*

## BRIEF ON BEHALF OF THE UNITED STATES.

This case is brought here upon a writ of error to the United States district court for the district of Alaska, first division, for the purpose of reviewing a final order of that court refusing to discharge the petitioner from the custody of the United States marshal after a hearing upon a writ of *habeas corpus*.

### STATEMENT OF FACTS.

On the 10th day of December, 1900, an indictment was found in the district court for the district of Alaska, division No. 1, against C. E. Wynn-Johnson and Moore's Wharf Company, a corporation of Skagway, Alaska, of which company said Johnson was at that time the general manager. The indictment charges them with

the offense of unlawfully carrying on and conducting the business of a public wharf at the city of Skagway, Alaska, without having first applied for and obtained a license so to do from the United States district court in and for the district of Alaska, division No. 1, as required by sections 460 and 461 of the Alaska Code of Criminal Procedure. (Record, p. 3.)

It appears from the record that on the 12th day of March, 1901, C. E. Wynn-Johnson, the petitioner herein, entered into a recognizance in the sum of $200, for his appearance before said court to answer to said indictment. (Record, p. 5.) Thereafter, to wit, on the 29th day of October, 1901, H. B. Runnels and E. J. Shaw, the sureties on the bond of said petitioner, surrendered to James M. Shoup, United States marshal for the district of Alaska, and placed in his custody said petitioner, and directed him, said marshal, to keep him in custody in order to release said sureties from all liability by reason of their said undertaking. (Record, pp. 6 and 7.)

On the same day, to wit, the 29th day of October, 1901, while the petitioner was in the custody of said marshal, a petition was presented to Hon. Melville C. Brown, judge of the United States district court for the district of Alaska, for a writ of *habeas corpus*. (Record, p. 1.) The petition for said writ of *habeas corpus* alleges that said C. E. Wynn-Johnson is unlawfully imprisoned, detained, and deprived of his liberty by James M. Shoup, United States marshal for the district of Alaska, division No. 1, under and by virtue of a warrant issued out

of and under the seal of said court; that such warrant of arrest was based upon an indictment found by the United States grand jury at Skagway, Alaska, wherein the said petitioner was charged with unlawfully carrying on the business of a public wharf without first having obtained a license so to do. The petition further alleges that the law under which said indictment was found, which resulted in the arrest of said petitioner, is unconstitutional and void. Wherefore petitioner prayed that he may be discharged from the custody of said marshal and restored to his liberty. (Record, pp. 1 and 2.)

On the same day the marshal made and filed a return to said writ of *habeas corpus* (Record, p. 5), and the case was thereupon submitted to Judge Brown for his decision, the only question presented being as to whether section 460 of the Alaska Penal Code, imposing license fees upon certain lines of trade and business therein specified, was constitutional, the claim of counsel for petitioner being that such law imposed a tax in violation of the first clause of section 8 of article 1 of the Federal Constitution, in that the tax was not uniform throughout the United States.

On the 20th day of June, 1902, an opinion was rendered by the court, wherein the constitutionality of the law was sustained. Whereupon the court refused to discharge said Johnson from custody, and made an order remanding him to the custody of the United States marshal to be held for trial upon the indictment. (Record, pp. 8, 9, 10, and 11.)

Thereafter, to wit, on the 19th day of January, 1903, a petition for a *writ of error* having been presented to the court, an order was made that a *writ of error* be allowed as prayed for. (Record, pp. 18 and 19.)

## QUESTIONS OF LAW.

### I.

**It is suggested, in behalf of the Government, that this writ of error should be dismissed for the reason that it appears from the record that the habeas corpus proceeding in the court below was had before the United States district judge of Alaska sitting as a judge and not as a court.**

### II.

**The other question of law presented by this appeal is the constitutionality of section 460, of Title II, of the act of Congress of March 3, 1899 (30 Stat., 1253, 1336), as amended by the act of June 6, 1900 (31 Stat., 321, 330), imposing license fees for prosecuting certain specified lines of business and trade in the Territory of Alaska.**

## I.

As bearing upon the suggestion that this writ of error should be dismissed for the reason that the *habeas corpus* proceedings in the court below were had before the United States district judge of the Territory of Alaska *sitting as a judge* and not *as a court*, we respectfully direct the court's attention to the following facts:

The petition for the writ of *habeas corpus* in the case at bar is addressed "*To Honorable Melville C. Brown, Judge of the United States District Court for the District of Alaska, Division No. 1.*" (Record, p. 1.) The order directing that the *habeas corpus* issue, commands the United States marshal for the district of Alaska to pro-

duce the body of the said C. E. Wynn-Johnson *before M. C. Brown, the judge of said court*, in the court room of said court at Skagway, in said district, on the 29th day of October, 1901, etc. (Record, pp. 2 and 3.) The writ of *habeas corpus* issued under and pursuant to said order, commands the United States marshal to have the body of the said C. E. Wynn-Johnson, by said marshal imprisoned and detained, together with the time and cause of such imprisonment and detention, "*before Melville C. Brown, judge of the United States district court for the district of Alaska*, division No. 1, at the court room of said court, at Skagway, in said district of Alaska, on the 29th day of October, 1901, at 3.30 o'clock in the afternoon of said day, to do and receive what shall then and there be considered concerning the said C. E. Wynn-Johnson." (Record, p. 4.) The order subsequently made and entered by the Hon. M. C. Brown, judge of said court, remanding the prisoner to the custody of the marshal, recites, it is true, that the cause was submitted to the *court*, and that the *court*, having had the same under consideration, and being duly advised in the premises, denies the relief prayed for in the writ, and refuses to discharge the petitioner from custody. (Record, p. 12.)

But it is suggested, as was said by this court in the case of *Carper* v. *Fitzgerald* (121 U. S., 87), that if the *habeas corpus* proceedings were actually had *before the judge as such*, that the fact that the papers were subsequently filed with the clerk of the court would be ineffectual to change the nature of the proceeding from one before a judge to one before the court.

Mr. Chief Justice Waite, in delivering the opinion of the court in *Carper* v. *Fitzgerald* (*supra*), said:

> From this order the jailer was allowed an appeal to this court by the circuit judge, and the case was docketed here as "an appeal from the circuit court of the United States for the eastern district of Virginia." The form of the docket entry here does not change the character of the proceeding from which the appeal was taken, and that was clearly under section 752 of the Revised Statutes, before the judge sitting as a judge, and not as a court. The act of March 3, 1885, c. 353, 23 Stat., 437, gives an appeal to this court in *habeas corpus* cases only from the final decision of a circuit court.
>
> The order of the judge that the papers be filed, and his order recorded in the circuit court, does not make his decision as judge a decision of the court. Neither does our Rule 34, 117 U. S., 708, adopted at the last term, have that effect. The purpose of that rule was to regulate proceedings on appeals under section 763, from the decision of a judge to the circuit court of the district, as well as under section 764, as amended by the act of March 3, 1885, from a circuit court to this court. Power to make such a regulation was given to this court by section 765 of the Revised Statutes.

Chapter 57, of the Alaska Code of Civil Procedure (31 Stat., 423), entitled "Of the writ of *habeas corpus*," specifically provides the practice to be followed in securing a review by this court of a final decision of a district court of the Territory of Alaska in a *habeas*

*corpus* case. That law contains, among other things, the following provision:

> SEC. 608. Any party to a proceeding by habeas corpus, including the United States when the district attorney appears therein, may appeal from the judgment of the district court refusing to allow such writ or any final judgment therein, either in term time or vacation, in like manner and with like effect as in an action. No question once finally determined upon a proceeding by habeas corpus shall be reexamined upon another or subsequent proceeding of the same kind.

It will thus be seen that an appeal may be taken from the final judgment of *the district court* "in like manner and with like effect as in an action." This would seem to authorize an appeal by writ of error, the practice followed in the case at bar, if taken within one year from the date of the judgment sought to be reviewed. It will be observed that the statute above quoted substantially changes the practice relative to appeals in *habeas corpus* cases from United States district or circuit courts within the States, where the appeal must be taken *within six months* from the date of the final judgment, and must be brought up *by appeal* and not by *writ of error*.

Sections 570 and 571, of the Alaska Code of Civil Procedure,[a] expressly provide that a writ of *habeas corpus* may be issued by and be made returnable before either the *court* or the *judge* of the United States district court for said Territory. It will be observed, however, that section 608, above quoted, makes provision for an appeal "from the judgment of the district *court*," etc. Our suggestion, therefore, is that if the record in the case at bar shows that the proceedings in the court below were had before *the United States district judge* for the district of Alaska and not before *the court as such*, no appeal is authorized by law on the authority of *Carper* v. *Fitzgerald* (*supra*).

*McKnight* v. *James*, 155 U. S., 685;
*Lambert* v. *Barrett*, 157 U. S., 697;
*Whitten* v. *Tomlinson*, 160 U. S., 231–244.

But see also:

*In re Palliser*, 136 U. S., 257;
*Harkrader* v. *Wadley*, 172 U. S., 148.

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[a] SEC. 570. The court or judge to whom the petition is presented must allow the writ without delay, unless it appears from the petition itself, or from the documents annexed thereto, that the person for whose relief it is intended is by the provisions of this chapter prohibited from prosecuting the writ. Upon the filing of the petition and the order of allowance with the clerk, the clerk shall issue the writ immediately in accordance therewith.

SEC. 571. The writ shall command the defendant to produce the person imprisoned or restrained, by whatsoever name he may be charged or called, and certify and return therewith the time and cause of his imprisonment or restraint, before the court or judge allowing the writ, at a time and place therein specified, or immediately after the receipt of the writ, to do and receive what shall then and there be considered concerning the person so imprisoned or restrained; or when it appears by the petition and documents thereto annexed that the cause or offense for which the person is imprisoned or restraint is not bailable, the production of the party may be dispensed with, though such production be prayed for in the petition and the writ issued accordingly.

## II.

**The contention of the Government is that section 460, of Title II, of the act of March 3, 1899, as amended by the act of June 6, 1900, imposing license fees for prosecuting certain lines of business and trade in the Territory of Alaska, is constitutional not by reason of the general power of taxation provided for in Article I, section 8, of the Constitution, but from the plenary power "to make all needful rules and regulations respecting the Territory, or other property belonging to the United States" (Article I, section 3, par. 2), and that the exercise of such power is not subject to the provisions limiting the general power of taxation either as to apportionment or uniformity.**

This same question was before this court at the last term in the so-called Alaska license cases, which are reported in 187 U. S., 447, 454, 455, and 466; and is also presented in the case of *Joseph R. Binns* v. *United States*, No. 196, of this present term, submitted to the court without argument on April 6, 1904. Binns was tried and convicted in the district court of Alaska upon the charge of having carried on the business of a transfer company without first having obtained a license so to do, and the case was brought to this court on a writ of error to review such final judgment of conviction.

In view of the fact that, so far as the constitutional question is involved, the two cases are identical, we respectfully submit that portion of the Government's brief in the Binns case, from page 5 to page 31, inclusive, in support of the constitutionality of the law which has again been drawn in question.

Copies of the Government's brief in the case of *Joseph R. Binns* v. *United States*, No. 196, October term, 1903, are herewith submitted for the convenience of the court.

Respectfully submitted.

MILTON D. PURDY,
*Assistant Attorney-General.*

O

# Supreme Court of the United States.

Nos. 196 and 266.—October Term, 1903.

Joseph R. Binns, Plaintiff in Error, vs. The United States. } In error to the District Court of the United States for the District of Alaska.

[May 31, 1904.]

Section 460 of Title II of the Alaska Penal Code, (Act of March 3, 1899, 30 Stat. 1253, 1336,) as amended by the act of June 6, 1900, entitled "An act making further provision for a civil government for Alaska, and for other purposes," (31 Stat. 321, 330,) reads "that any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain license so to do from a District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit: . . . Transfer companies, fifty dollars per annum."

Section 461 provides: "That any person, corporation or company doing or attempting to do business in violation of the provisions of the foregoing section, or without having first paid the license therein required, shall be deemed guilty of a misdemeanor," &c.

Section 463: "That the licenses provided for in this act shall be issued by the clerk of the District Court or any subdivision thereof . . . duly made and entered: . . . Provided, That . . . all moneys received for licenses by him . . . under this act shall, except as otherwise provided by law, be covered into the Treasury of the United States, under such rules and regulations as the Secretary of the Treasury may prescribe."

Under this statute, plaintiff in error was prosecuted and convicted in the District Court for the District of Alaska, Second Division. This conviction has been brought to this court on writ of error, and the question presented is whether the statute is in conflict with section 8 of Article I of the Constitution of the United States, which reads: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Mr. Justice Brewer delivered the opinion of the Court.

The contention of plaintiff in error is that the license tax is an excise, that it is laid and collected "to pay the debts and provide for the common

defence and general welfare of the United States," because by section 463 it is provided that "all moneys received for licenses . . . under this act shall . . . be covered into the Treasury of the United States," that it is imposed only in Alaska, and is not "uniform throughout the United States."

It is unnecessary to consider the decisions in the Insular cases, for, as said by Mr. Justice White in his concurring opinion in *Downes* v. *Bidwell*, (182 U. S. 243, 335): "Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation and was acted upon;" and by Mr. Justice Gray, in his concurring opinion (p. 345): "The cases now before the court do not touch the authority of the United States over the territories, in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the territories of Alaska and Hawaii; but they relate to territory, in the broader sense, acquired by the United States by war with a foreign State."

It had been theretofore held by this court in *Steamer Coquitlam* v. *United States*, (163 U. S. 346, 352,) that "Alaska is one of the Territories of the United States. It was so designated in that order (the order assigning the Territory to the Ninth Judicial Circuit) and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that Territory." Nor can it be doubted that it is an organized Territory, for the act of May 17, 1884, (23 Stat. 24,) entitled "An act providing a civil government for Alaska," provided: "That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided." See also 31 Stat. 321, sec. 1.

We shall assume that the purpose of the license fees required by section 460 is the collection of revenue, and that the license fees are excises within the constitutional sense of the term. Nevertheless we are of opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the administration of local government in Alaska.

It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a *quasi* State government, with executive, legislative and judicial officers, and a legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to

this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes.

In reference to the power of Congress reference may be had to *Gibbons* v. *District of Columbia*, (116 U. S. 404,) in which it was held that "it is within the constitutional power of Congress, acting as the local legislature of the District of Columbia, to tax different classes of property within the District at different rates;" and further, after referring to the case of *Loughborough* v. *Blake*, (5 Wheat. 317,) it was said (pp. 407, 408):

"The power of Congress, legislating as a local legislature for the District, to levy taxes for District purposes only, in like manner as the legislature of a State may tax the people of a State for State purposes, was expressly admitted, and has never since been doubted. (5 Wheat. 318; *Welch* v. *Cook*, 97 U. S. 541; *Mattingly* v. *District of Columbia*, 97 U. S. 687.) In the exercise of this power Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

In view of this decision it would not be open to doubt that, if the act had provided for a local treasurer to whom these local taxes should be paid and directed that the proceeds be used solely in payment of the necessary expenses of the government of Alaska, its constitutionality would be clear, but the contention is that the statute requires that the proceeds of these licenses shall be paid into the Treasury of the United States, from which, of course, they can only be taken under an act of Congress making specific appropriation. In fact, all the expenses of the Territory are, in pursuance of statute, paid directly out of the United States Treasury. (Act of June 6, 1900, Title I, sections 2 and 10, 31 Stat. 322, 325; Act of March 3, 1901, 31 Stat. 960, 987; April 28, 1902, 32 Stat. 120, 147, and February 25, 1903, 32 Stat. 854, 882.) True, there are some special provisions for revenues and their application. Thus, the fees for issuing certificates

of admission to the bar and for commissions to notary publics are to be retained by the secretary of the district and "kept in a fund to be known as the District Historical Library Fund" and designed for "establishing and maintaining the district historical library and museum," (Act of June 6, 1890, Title I, sec. 32, 31 Stat. 333,) and municipal corporations are authorized to impose certain taxes for local purposes. (Title III, sec. 201, 31 Stat. 521.) By section 203, fifty per cent of all the license moneys collected within the limits of such corporations are to be paid to their treasurers to be used for school purposes. By subsequent legislation, (31 Stat. 1438,) it is provided that if the amount thus paid is not all required for school purposes the District Court may authorize the expenditure of the surplus for any municipal purpose. And by the same statute it is also provided that fifty per cent of all license moneys collected outside municipal corporations and covered into the Treasury of the United States shall be set aside to be expended for school purposes outside the municipalities. By still later legislation (although that was enacted after the commencement of this prosecution, 32 Stat. 946,) the entire proceeds of license taxes within the limits of municipal corporations are to be paid to the treasurer of the corporation, for school and municipal purposes.

But outside of these special matters there are no provisions for collecting revenue within the Territory for the expenses of the Territorial government other than these license taxes and charges of a similar nature. According to the information furnished by the officers of the Treasury Department, as shown in the brief of counsel for the Government, all the revenues of every kind and nature which can be considered as coming from Alaska are not equal to the cost and expense of administrating its Territorial government. How far we are at liberty to rely upon this information, which was not presented upon the trial of this case, or how far we can take judicial notice of the facts as shown by the records of the Treasury Department, need not be determined, for if an excess of revenue above the cost and expense of administering the Territorial government must be shown to establish the unconstitutionality of the license taxes the fact should have been shown by the plaintiff in error. The presumptions are that the act imposing those taxes is constitutional, and anything essential to establish its invalidity which does not appear of record or from matters of which we can take judicial notice must be shown by the party asserting the unconstitutionality.

The question may then be stated in this form: Congress has undoubtedly the power by direct legislation to impose these license taxes upon the residents of Alaska, providing that when collected they are paid to a treasurer of the Territory and disbursed by him solely for the needs of the Territory. Does the fact that they are ordered to be paid into the Treasury of the United States and not specifically appropriated to the ex-

penses of the Territory, when the sum total of these and all other revenues from the Territory does not equal the cost and expense of maintaining its government, make them unconstitutional? In other words, if, under any circumstances, Congress has the power to levy and collect these taxes for the expenses of the Territorial government, is it essential to their validity that the proceeds therefrom be kept constantly separate from all other moneys and specifically and solely appropriated to the interests of the Territory? We do not think that the constitutional power of Congress in this respect depends entirely on the mode of its exercise. If it satisfactorily appears that the purpose of these license taxes is to raise revenue for use in Alaska, and that the total revenues derived from Alaska are inadequate to the expenses of the Territory, so that Congress has to draw upon the general funds of the nation, the taxes must be held valid. That the purpose of these taxes was to raise revenue in Alaska for Alaska is obvious. They were authorized in statutes dealing solely with Alaska. There is no provision for a direct property tax to be collected in Alaska for the general expenses of the Territory. The entire moneys collected from these license taxes and otherwise from Alaska are inadequate for the expenses of that Territory. So far as we may properly refer to the proceedings in Congress, they affirm that these license taxes are charges upon the citizens of Alaska for the support of its government. While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, (*United States* v. *Freight Association*, 166 U. S. 290, 318,) yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports. (*Holy Trinity Church* v. *United States*, 143 U. S. 457, 464.) When sections 461 and 462 were under consideration in the Senate the chairman of the Committee on Territories, in response to inquiries from Senators, made these replies:

"The Committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the Territory of Alaska. . . . They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, &c., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the Territory of Alaska, including the governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them." (Vol. 32, Congressional Record, Part III, page 2235.)

While, of course, it would have simplified the matter and removed all doubt if the statute had provided that those taxes be paid directly to some local treasurer and by him disbursed in payment of Territorial expenses, yet it seems to us it would be sacrificing substance to form to hold that the method pursued, when the intent of Congress is obvious, is sufficient to invalidate the taxes.

In order to avoid any misapprehension we may add that this opinion must not be extended to any case, if one should arise, in which it is apparent that Congress is by some special system of license taxes seeking to obtain from a Territory of the United States revenue for the benefit of the nation as distinguished from that necessary for the support of the Territorial government.

We see no error in the record, and the judgment is *Affirmed.*

Mr. Justice HARLAN took no part in the decision of this case.

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No. 266.

C. E. Wynn-Johnson, Plaintiff in Error, *vs.* James M. Shoup, United States Marshal for the District of Alaska. } In error to the District Court of the United States for the District of Alaska.

[May 31, 1904.]

Mr. Justice BREWER delivered the opinion of the Court.

This case is similar to the one just decided, and, for the reasons given in that opinion, the judgment of the District Court of Alaska is

*Affirmed.*

Mr. Justice HARLAN took no part in the decision of this case.

True copy.

Test:

*Clerk Supreme Court, U. S.*

1848

END OF CASE